

United States  
Court of Appeals  
For the Ninth Circuit.

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C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Appellant,

vs.

KATHLEEN HUTCHENS,

Appellee.

KATHLEEN HUTCHENS,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Appellee.

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Transcript of Record

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Appeals from the United States District Court,  
for the District of Oregon.

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No. 12914

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the  
District of Oregon

Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation.

Defendant and

Third-Party Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

NOTICE TO STATE INDUSTRIAL ACCIDENT  
COMMISSION

To the State Industrial Accident Commission of the  
State of Oregon:

You are hereby notified that the above-named plaintiff has commenced an action against the above-named defendant in the United States District Court for the District of Oregon, the complaint in said action being filed on the 29th day of September, 1949.

This notice is given to you pursuant to the provisions of Section 102-1729, O.C.L.A.

/s/ HARRY GEORGE, JR.,

Of Attorneys for Plaintiff.

State of Oregon,  
County of Marion—ss.

Service of the foregoing notice on the State Industrial Accident Commission is accepted in Salem, Marion County, Oregon.

/s/ PAUL E. GURSKE,  
Commissioner.

Claim No: Claim No. Pending  
Name: Hollis Dean Hutchens

Received January 3, 1950.

[Endorsed]: Filed January 11, 1950.

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[Title of District Court and Cause.]

### MOTION FOR SEPARATE TRIALS

Comes now William A. Babcock, attorney for plaintiff, and moves the Court for an order providing for separate pre-trial conferences, pre-trial orders and separate trials in the principal action and in the third-party action in the above-entitled causes and in support thereof represents and alleges as follows:

The principal action is an action founded in tort and brought under the Employers Liability Act of the State of Oregon for damages for the death of plaintiff's husband which allegedly resulted from the negligence of the defendant C. D. Johnson Lumber Corporation. Timely request for trial by jury was made in said action and answer to the com-

plaint has been filed by the defendant C. D. Johnson Lumber Corporation but no answer or counterclaim or cross-claim has been filed to the complaint by the third-party defendant, William R. Francis. The plaintiff has asserted no claim against the third-party defendant, William R. Francis.

The third-party complaint is based on a claim under an alleged contract between the third-party plaintiff, C. D. Johnson Lumber Corporation, and the third-party defendant, William R. Francis, under which it is alleged the third-party defendant is bound to indemnify or save harmless the third-party plaintiff for any damages it sustains because of the claim in the principal action.

An answer has been filed to the third-party complaint by the third-party defendant. More than ten days have elapsed since answer was filed and no request for trial by jury in the third-party action has been made by either party.

The evidence which will be introduced and the witnesses which will be called in the principal action are for the most part different than in the third-party action.

The trial of the third-party action with the principal action would tend to unduly complicate and confuse the issues in the principal action and the presentation of the evidence, and would prejudice the claim of the plaintiff against the defendant C. D. Johnson Lumber Corporation.

It will be more convenient for the principal action and the third-party action to be separately tried

and to have separate pre-trial conferences and separate pre-trial orders made.

Wherefore plaintiff prays that orders be entered, that separate pre-trial conferences be held, that separate pre-trial orders be made and that separate trials be held in the principal action and in the third-party action.

Dated this 19th day of January, 1950.

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff.

I, William A. Babcock, hereby certify that I am attorney of record for plaintiff herein and that I served a true copy of the foregoing motion for separate trials upon James Arthur Powers, attorney for defendant, C. D. Johnson Lumber Corporation, and Hugh L. Biggs and Karl T. Huston, attorneys for third-party defendant, William R. Francis, on the 20th day of January, 1950, by depositing such true copies in the United States Post Office, Portland, Oregon, sealed in envelopes with postage fully prepaid thereon and addressed to the proper addresses of said attorneys.

Dated January 20, 1950.

/s/ WM. A. BABCOCK,  
Attorney for Plaintiff.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

MOTION

Comes now defendant C. D. Johnson Lumber Corporation and moves the Court for an order requiring plaintiff to elect as to whether she will proceed on the theory that the deceased was an employee of Third-Party Defendant William R. Francis or an employee of Defendant C. D. Johnson Lumber Corporation. Under the contentions now made by plaintiff the position appears to be that the deceased was jointly employed by both of the aforesaid employers. That this defendant is entitled to know which theory plaintiff will proceed upon in order to present to the Court legal objections in advance of the trial. It is the theory of this defendant that plaintiff seeks to recover on a basis of joint employment of the deceased by both employers; that the action under the Oregon Statutes cannot be maintained.

KING, WOOD, MILLER  
& ANDERSON

/s/ JAMES ARTHUR POWERS,  
Of Attorneys for Defendant and Third-Party Plaintiff,  
C. D. Johnson Lbr. Corp.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 9, 1950.

[Title of District Court and Cause.]

### ORDER JUNE 14, 1950

Plaintiff appearing by Mr. William A. Babcock and Mr. Emerson Sims, of counsel, and the defendant by Mr. James Arthur Powers, of counsel.

It Is Ordered that Mr. Cleveland C. Corey, be, and is hereby, permitted to appear specially in this cause, on behalf of the defendant, pending his general admission to the bar of this court. Further pre-trial conference had.

It Is Ordered that the issues between plaintiff and defendant be segregated and that the issues between defendant and third-party defendant be reserved for later disposition.

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[Title of District Court and Cause.]

### PRE-TRIAL ORDER

On May 22, 1950, a pre-trial conference was held in open Court, the Honorable Gus J. Solomon, Judge of this Court, presiding. The plaintiff appeared by her counsel, William A. Babcock and Emerson Sims; the defendant, C. D. Johnson Lumber Corporation, appeared by one of its attorneys, James Arthur Powers (James Arthur Powers and Earle P. Skow, King, Wood, Miller and Anderson), and the third-party defendant appeared by one of his attorneys, Hugh L. Biggs (Hart, Spencer, McCulloch, Rockwood and Davies, and Karl T. Huston).



Agreed Statement of Facts Between Plaintiff and  
Defendant, C. D. Johnson Lumber Corporation

I.

Plaintiff is a citizen of the State of Oregon. Defendant, C. D. Johnson Lumber Corporation, is a corporation duly organized and existing under the laws of the State of Nevada and is doing business in the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

Plaintiff was the wife of Dean Hutchens. Dean Hutchens died on August 19, 1949, leaving plaintiff as his widow and leaving no children.

III.

At all times herein involved, defendant, C. D. Johnson Lumber Corporation, was engaged in operating a sawmill and other facilities at Toledo, Oregon. In connection with its sawmill, the defendant owned and maintained a dock and log unloading dump located on the Yaquina River. On the edge of the dock were located three brow logs used in connection with the unloading of trucks and a movable lifting crane consisting of a converted Marion type shovel which was moved from one brow log to the other to unload the logs off the trucks. The brow log farthest from the approach to the dock was the one in use at the time of the accident herein involved.

The usual process in unloading a truck was as follows: One end of a sling line was anchored to the

brow log and the other end left free. Log trucks were driven to a place alongside the brow log being used and spotted in position by a signal from the crane engineer. In unloading the trucks the truck driver took the free end of the sling line and placed it under the logs to be unloaded, then attached it to the lifting crane. When the line was so attached, the engineer operating the crane took the slack out of the line. The truck driver then made his load ready for dumping and gave a signal to the crane engineer to hoist the log.

#### IV.

On August 19, 1949, the deceased, Dean Hutchens, was the driver of a logging truck delivering logs to said dock and was engaged in log unloading operations near said brow log. The truck being unloaded consisted of one large log approximately 40 feet long and 52 inches in diameter. Dean Hutchens spotted the truck under the unloading dump at a point indicated by the crane engineer. He thereupon got out of the truck and pulled the sling line over the reach and under the log and fastened the end of it to the hook on the unloading crane. Deceased was killed by being struck by the log as it was being unloaded from the truck while he was in a position between the trailer of the truck and the brow log.

#### V.

The deceased was on premises owned by the C. D. Johnson Lumber Corporation at the time of the accident and his death.



VI.

The deceased was born on June 22, 1928. At the time of his death deceased was an able-bodied workman with a life expectancy of forty-four years under standard mortality rates.

VII.

At the time of the accident and death, the truck being operated by deceased was the only truck on the premises being unloaded.

VIII.

The decedent, Dean Hutchens, was the registered owner of the truck he was operating.

IX.

The defendant, C. D. Johnson Lumber Corporation, owned and maintained the unloading dock and the unloading crane and brow logs used there for the unloading of trucks.

X.

It is admitted that plaintiff bases her cause of action and right to recover solely under the Oregon Employer's Liability Act.

Disputed Issues of Fact

Contentions of Plaintiff

I.

The decedent, Dean Hutchens, at the time and place he received his fatal injuries, was in the service and employment of W. R. Francis as a log truck

driver hauling logs for W. R. Francis to the unloading dock of the defendant, C. D. Johnson Lumber Corporation, and as a part of such employment was assigned by his employer to assist in the unloading of the truck at said unloading dock. Decedent was engaged in such work under the following circumstances:

(1) W. R. Francis had a contract with the defendant, C. D. Johnson Lumber Corporation, to log certain timber belonging to the said defendant, and to deliver it by truck to the dock of the defendant at Toledo at an agreed rate per thousand board feet of logs. Under the terms of said agreement, the defendant, C. D. Johnson Lumber Corporation, was to unload the logs from the trucks. The contract between C. D. Johnson Lumber Corporation and W. R. Francis for the logging and delivery of said logs contemplated that the unloading of the trucks was to be done by the defendant, C. D. Johnson Lumber Corporation, and that the truck drivers would assist the employees of C. D. Johnson Lumber Corporation by performing certain functions in connection with the unloading. In arriving at the contract price for logs, due consideration was given to the fact that the truck drivers would so assist in the unloading.

(2) Numerous other trucks, the number ranging from ten to fifty, were hauling logs each day to said dock during the period that the decedent was hauling logs from W. R. Francis' operation to the dock; all of said trucks were delivering one to four

loads a day to the dock from various operations. Said logs had been purchased by the defendant, C. D. Johnson Lumber Corporation, or belonged to that corporation and had been logged by contractors for said defendant. The number of loads delivered to said dock daily ranged from thirty to more than one hundred.

(3) Defendant, C. D. Johnson Lumber Corporation, operated and had charge of the unloading dock at the time of the accident. All the employees working at said dock in connection with the unloading of logs with the exception of the log truck drivers were directly hired and paid by said defendant. All persons who worked or performed duties at said dock in connection with the unloading of logs did so under the direction and supervision of the defendant, C. D. Johnson Lumber Corporation.

(4) In July, 1949, decedent made oral arrangements with W. R. Francis to haul logs from Francis' operation to the C. D. Johnson Lumber Corporation dock at Toledo at an agreed rate per thousand board feet for the haul as compensation for the truck and for Hutchens' services as a driver. It was agreed that Hutchens would haul exclusively for Francis when he and his truck were needed. Hutchens did not agree to haul and Francis did not agree to furnish Hutchens with any certain quantity of logs or for any certain period. Either party was free to terminate the relationship at will.

(5) Hutchens was required to and did work the hours and days specified by W. R. Francis. He was

required to and did take his turn having his trucks loaded with logs along with the other truck drivers in the operation.

(6) The loading of the trucks was under the jurisdiction and control of the head loader, an employee of W. R. Francis.

(7) The head loader was responsible to properly load the said trucks in accordance with the Logging Safety Code of the State of Oregon. Hutchens was required to haul such logs as were placed on his truck and semi-trailer both as to the amount and type of logs and to take them to the place directed by the head loader.

(8) The manner of loading was substantially as follows: When the decedent, Dean Hutchens', turn came to have his truck loaded, the head loader would direct him where to place his truck so that it could be properly loaded. The head loader signalled the loading engineer to lift the semi-trailer off the truck to the ground while members of the loading crew, all employees of W. R. Francis, coupled the trailer to the truck. The head loader directed the spotting of the truck so that it could be loaded by a power-driven loading machine, the driver remaining in his truck and operating it as directed, after which the driver coupled the air brakes. The loader then selected the logs to be hauled and saw that they were properly placed in accordance with the requirements of the Logging Safety Code and other applicable laws. The driver might object to an overload or ask to have the load adjusted to balance it,

but in the case of any disagreement the final decision was that of the head loader, employed by W. R. Francis. After the logs were loaded they were scaled by the head loader, who gave the truck driver a slip showing his scale and who instructed the driver where the logs were to be delivered, which directions the driver was bound to follow. No truck driver was allowed to select the particular logs he would like to have on his truck, nor to select the particular destination to which said logs were to be delivered. After loading was completed and the scaling done, the truck driver put on his binder chains and drove his truck to the delivery destination point.

(9) Arriving at the destination point, the logs were unloaded and the trailer loaded on the truck under arrangements between C. D. Johnson Lumber Corporation and W. R. Francis. This was done as follows: The driver spotted his truck on signal from the operator of the unloading machine. The driver then hooked the sling lines from the machine around the logs and the lines were tightened. The driver then unfastened his binder chains and bunk blocks. On signal that everyone was in the clear, the unloading engineer raised the logs and rolled them over the side of the truck into the pond. After the load of logs had been dumped at the unloading dump, the trailer was then spotted under the hook of the unloading machine by the driver at the direction of the unloading engineer. The unloading engineer then started the machinery and raised the



truck into the air, and at the signal from the engineer the truck driver backed his truck under the suspended trailer to such position that when the trailer was dropped the tires fit into the proper notches on the truck and the reach into its slot overhanging the cab of the truck, after which the unloading engineer detached the hook and the driver drove off. After the trailer had been loaded on the truck, the truck was then driven back to the landing in the woods by the driver.

(10) The hauling of logs was an essential and integrated part of the operation of logging being carried on by W. R. Francis.

(11) The work performed by the decedent, Dean Hutchens, in the hauling of logs from the logging operations of W. R. Francis to the unloading dock of the defendant, C. D. Johnson Lumber Corporation, was manual work consisting of the driving of the truck and in the fastening and handling of lines, chains and blocks, and the decedent, Dean Hutchens, did not direct, control or supervise the work of any other person. He did not own any trucks other than the one which he himself drove.

(12) The work that the decedent, Dean Hutchens, performed at the landing where the logs were loaded, in the driving of the truck and in assisting the unloading engineer at the unloading dock and the unloading of the truck was in no respect different from the work performed in the same activities by log truck drivers who did not own their own trucks but who were paid for their driving and other

activities on the basis of an hourly wage or an agreed amount or percentage per thousand board feet of logs hauled.

(13) During the time that the decedent, Dean Hutchens, was hauling logs for W. R. Francis, with the exception of one week in which he hauled for another firm with the permission of Francis, he was engaged in no other hauling work and was engaged in no other occupation or business.

## II.

In the unloading of the truck, decedent assisted the unloading engineer and boom foreman employed by defendant, C. D. Johnson Lumber Corporation, and worked under the direction of said defendant and pursuant to its instructions and regulations.

## III.

At the time of the fatal accident, the defendant, C. D. Johnson Lumber Corporation, was the owner or person in charge of and responsible for the operation of the unloading dump and unloading machinery and facilities and for the work then and there being performed.

## IV.

At the time of the accident, Dean Hutchens was engaged in work assisting the unloading engineer to unload the load, which required him to be at the place where he received his fatal injuries. Said work involved a risk or danger to decedent.

## V.

At the time and place of the accident, the unloading engineer and the boom foreman employed by the defendant corporation were the foremen or persons in charge of the work.

## VI.

The signal to unload the log was given by the agent of the defendant corporation, the boom foreman, and the log was unloaded without notice or warning to the decedent. The engineer did not look to see whether Dean Hutchens was in the clear before he unloaded the log. If he had looked, he would have known that decedent was or might be in a place of danger, and the engineer could have avoided the accident.

## VII.

The defendant, C. D. Johnson Lumber Corporation, was negligent and failed to furnish the decedent, Dean Hutchens, with a safe place of employment and failed to use every device, care and precaution practicable to protect the safety of the decedent in the following particulars:

(1) In failing to furnish and provide an adequate number of trained, experienced men for its unloading crew and for the operation of the unloading machine, so that the unloading engineer would not have caused the load to be moved until decedent was in the clear, in violation of Section 6.5 of the Safety Code for Sawmills, Woodworking and Allied Industries of Oregon, and of Section



17.14 of the Logging Safety Code of the State of Oregon;

(2) In failing to require that all signals for the unloading of logs should come from a single designated person;

(3) In failing to provide sufficient workmen for the proper operation of the dump, and in requiring the driver of the truck being unloaded to assist in the unloading;

(4) In failing to make and enforce proper rules and regulations for the safe operation of the dump and conduct personal safety instructions of the employees engaged in the performance of the work at the dump, and in violation of the provisions of Sections 1.12, 1.13, 1.14 and 1.17 of the Logging Safety Code of the State of Oregon and Sections 1.16, 1.17(a) and 1.20 of the Sawmill Safety Code of the State of Oregon;

(5) In causing the log to be unloaded from the truck without notice or warning to the decedent, and in violation of Section 6.12 of the Sawmill Safety Code of the State of Oregon;

(6) In failing to provide the unloading machine with an audible warning device and in failing to sound an audible warning before unloading the log, and in violation of Section 3.4 of the Sawmill Safety Code of the State of Oregon;

(7) In failing to have stationed at the unloading dock an additional employee to assist the unloading engineer in the unloading of the logs and

to give signals for the unloading of logs, and to perform the duty of making certain that all persons were in the clear before a load was unloaded.

(8) In unloading said log without observing that the decedent was in the clear, and in violation of Section 17.14 of the Logging Safety Code of the State of Oregon and Section 6.12 of the Sawmill Safety Code of the State of Oregon;

(9) In giving the signal to unload the log and in causing it to be unloaded at a time when its agents knew, or, by the exercise of reasonable diligence should have known, that decedent was in a place of danger.

#### VIII.

It was practicable, without impairing the efficiency of the work then and there being done, to have protected, safeguarded and rendered safe the employment and place of employment by taking any or all of the precautions and correcting any or all of the conditions described in Paragraph VII immediately above.

#### IX.

One or more of the acts or omissions on the part of the defendant set forth in Paragraph VII immediately above was the sole, direct and proximate cause of the injuries resulting in the death of the decedent, Dean Hutchens.

#### X.

Prior to the accident, Dean Hutchens was a well, active, able-bodied workman of the age of twenty-one years, regularly employed and earning a net

sum of more than \$3,000.00 annually, and having a life expectancy of approximately forty-four years. He used substantially all of his income for the care and maintenance of the plaintiff and their home, and performed and furnished services, advice and counsel and other assistance to her. Plaintiff, by his death, has been deprived of his services, advice, counsel and financial and other aid and assistance, and has been generally damaged in the sum of \$75,000.00.

## XI.

Plaintiff, as a result of Dean Hutchens' death, has been obliged to pay or incur burial and funeral costs of the reasonable value of \$974.71, and has been specially damaged in that amount.

### Contentions of Defendant C. D. Johnson Lumber Corporation

#### I.

The accident and death of the deceased, Dean Hutchens, is not governed by nor subject to the Employers' Liability Act of the State of Oregon:

1(a). The work said deceased was doing at the time and place of accident and his death, was that of an independent contractor, and

(b) The State Industrial Accident Commission has heretofore determined that the said decedent was acting at the time of his accident and death as an independent contractor and not as an employee.

2. The contract of the deceased was with W. R. Francis, hereinafter called the "Logger," and said

Logger had a contract with this defendant to deliver certain logs in the water of Yaquina River at Toledo and until so delivered the said Logger was to retain control of said Logs and was required to unload the same. As a result thereof the said contract with this defendant as verbally amended provided that the said Logger should pay the whole wages of the said crane engineer, an employee of this defendant, for such time as the said crane engineer spent unloading logs for the said Logger. The deceased, in turn, contracted with the Logger to deliver certain of the above logs as hereinabove described, and at the time of his accident and death was engaged in the performance of that said contract for the said Logger.

3. The deceased made his own working conditions and had effective control of said unloading operation and crane engineer assisting therein; in particular the deceased was required by contract, and custom to be solely in charge of:

(a) attaching sling line to the log, and

(b) unfastening his load, and

(c) checking to see that the said unloading operation could be done safely, and especially of checking to see that the boom man on the water was clear of the unloading area, and

(d) giving the signal to the crane engineer to commence unloading after deceased had completed the said required safety check.

4. It was required by law, custom and instruction that the deceased never place himself between

the brow log and the log load, and to take a safe place in giving said unloading signal, and there was such place to stand. And Further, it was the responsibility of the deceased upon his own initiative and without any order or instruction from anyone else to occupy such safe place and remain there until said unloading operation was completed.

5. This defendant denies that the sections of the Logging and Sawmill Safety Codes of the State of Oregon relied on by the plaintiff have any application to this action insofar as this defendant is concerned.

## II.

If the deceased was in fact an employee of the third-party defendant, the said William R. Francis, as is contended by the plaintiff, then in that event, it was the duty of the said William R. Francis and not of this defendant to instruct the deceased as to the manner of carrying out the unloading operation and particularly not to stand between the truck and the brow log while the log was being unloaded, and the said William R. Francis failed or neglected to give such instruction, and the said negligent failure to give said instructions concurred with the negligence of the deceased as hereinafter set forth to proximately cause said accident and death.

## III.

This defendant contends that the deceased was negligent, and that his negligence was the proximate cause of his accident and death in the following particulars:



1. In failing to comply with the standing instructions of this defendant to all truck drivers and contract log haulers to stand clear of the unloading operation and, in particular, not to stand between the truck and the brow log.

2. If the deceased was in fact an employee of the third-party defendant, the said William R. Francis, as is contended by the plaintiff, the deceased failed to comply with the Safety Code and standing instructions of the said William R. Francis not to stand between the truck and the brow log while the logs were being unloaded from the truck, if in fact any such instructions were given.

3. In violating the Logging Safety Code of the State of Oregon, particularly:

(a) Section 17.15 which provided that: "Men shall not go between the brow log and a load of logs," and

(b) Section 17.13 which provides that: "Binders and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading."

4. In leaving a place of safety and placing himself in a perilous position between the log being unloaded and the brow log after having given the signal to the crane engineer to unload the log on deceased's truck.

5. In failing to take a safe position while the log was being unloaded from his truck when there was a safe position open to him.

6. In failing to exercise ordinary care for his own safety under the circumstances then and there existing.

IV.

There is no basis of liability set out in the Contentions of Plaintiff other than the Employers' Liability Act of the State of Oregon.

V.

This defendant is not liable in this action to the deceased under any theory or under any statute.

Issues of Fact

I.

Was the deceased, Dean Hutchens, at the time of the accident in the employment of William R. Francis?

II.

In the event that it be determined that the deceased was an employee of William R. Francis at the time and place of the accident, was there an intermingling of employees of said William R. Francis and employees of defendant, C. D. Johnson Lumber Corporation, in the furtherance of a common purpose?

III.

Was the deceased, at the time of the accident, an independent contractor or an independent subcontractor?

IV.

Was the deceased, Dean Hutchens, at the time of the accident, engaged in lawful duties in the

accomplishment of a common purpose in which defendant, C. D. Johnson Lumber Corporation, had an interest?

V.

Were the logs under the contract required to be delivered in the Yaquina River by the Logger?

VI.

Did the work being carried on at the time of the accident involve a risk or danger to Dean Hutchens?

VII.

Was the defendant, C. D. Johnson Lumber Corporation, the owner, contractor, subcontractor or other person having charge of or responsible for the work being carried on?

VIII.

Was the deceased in control of the unloading operations of the truck?

IX.

Was the deceased in the joint employment, at the time and place of the accident, of William R. Francis and C. D. Johnson Lumber Corporation?

X.

Regardless of deceased's status of an employee or independent contractor, did he make his own working conditions?

XI.

Was the defendant, C. D. Johnson Lumber Corporation, negligent or did it fail to take every de-



vice, care or precaution practicable to protect and safeguard the life and limb of the deceased in one or more of the respects charged by the plaintiff?

XII.

Was one or more of such alleged acts of negligence on the part of said defendant a direct and proximate cause of the death of Dean Hutchens?

XIII.

Was there a safe place for the deceased to stand while the log was being lifted by the crane?

XIV.

Was the deceased negligent in one or more of the respects charged in defendant, C. D. Johnson's, contentions?

XV.

Was any such negligence on the part of the said deceased a direct and proximate cause of the death of Dean Hutchens?

XVI.

What is the amount of damage, if any, that plaintiff has suffered as a result of her husband's death?

XVII.

Did the work of deceased require him to be between the brow log and log load at the time of the accident?

XVIII.

Was defendant C. D. Johnson Lumber Corporation negligent in violating provisions of the Oregon

Employers' Liability Act as charged by plaintiff in her contentions?

## Issues of Law

### I.

Was the decedent, Dean Hutchens, at the time and place of his fatal injuries, one of the class of persons entitled to the protection and benefits of the Employers' Liability Act of the State of Oregon regardless of whether or not he was an employee of William R. Francis?

### II.

Was the decedent an employee of William R. Francis at the time of the accident?

### III.

Was the defendant, C. D. Johnson Lumber Corporation, the employer, owner or other person responsible for the work and place of work, at the time of the accident, within the meaning of the Employers' Liability Act of the State of Oregon and under the provisions of said Sections 102-1228 and 102-1229, Oregon Compiled Laws Annotated, and under the provisions of the Logging Safety Code and Sawmill Safety Code of the State of Oregon?

### IV.

Did the work which was being carried on at the time of the accident and death involve a risk or danger to the decedent within the meaning of the Employers' Liability Act of the State of Oregon?

V.

If the decedent was in charge of the unloading or made his own working conditions, does Employers' Liability Act of the State of Oregon apply in this action?

VI.

Can this action be maintained by the plaintiff under the Employers' Liability Act of the State of Oregon?

VII.

Does a violation of the Logging Safety Code or the Sawmill Safety Code of the State of Oregon constitute negligence per se?

VIII.

Is the determination by the State Industrial Accident Commission conclusive in this action as to the status of deceased at the time and place of the accident and death?

Exhibits

The following exhibits have been displayed by the parties respectively and are below enumerated and identified, the parties agreeing, with the approval of the Court, that no further identification of exhibits is necessary.

Plaintiffs' Exhibits

1. Depositions of Frederick Miles Neal, Clyde Vincent and Thomas Wood.
2. Photograph of Dean Hutchens.

3. Photograph of dock and log unloading dump of C. D. Johnson Lumber Corporation showing log trucks, one of which is in the process of being unloaded, taken from the north facing south.

4. Photograph of dock and unloading dump of C. D. Johnson Lumber Corporation showing one truck of logs in process of being unloaded, taken from north facing south.

5. Photograph of log unloading dump of C. D. Johnson Lumber Corporation showing one log truck in process of being unloaded, taken from the north-west facing in a southeasterly direction.

6. Photograph of log dock and dump of C. D. Johnson Lumber Corporation showing two log trucks and unloading machine and truck ramp, taken from the north facing south.

7. Photograph of log dock and dump of C. D. Johnson Lumber Corporation showing two logging trucks and unloading machine, taken from the south facing north.

8. Photograph of International logging truck with one-log load.

9. Photograph of rear end of logging trailer showing trailer bunk, trailer wheels and chain and binder in place over one log.

10. Photograph of left rear end of logging trailer showing trailer bunk wheels and chain fastened over one-log load.

11. Close-up view of bunk and block of log trailer.

12. Photograph of left rear end of logging trailer showing tires, bunk, block and chain being tied in position around bunk block.

13. Photograph of dock and log unloading dump of C. D. Johnson Lumber Corporation showing millpond, taken from south facing north, showing a portion of the unloading crane and a portion of the pond, without trucks on dock.

14. Photograph of log unloading dump of C. D. Johnson Lumber Corporation taken from south along edge of dock facing in a northerly direction, showing unloading crane and portion of the log pond. No trucks shown.

15. Statement or receipt covering funeral expenses of Dean Hutchens.

16. Statement or receipt showing burial expenses of Dean Hutchens.

17. Safety Code for Sawmill, Woodworking and Allied Industries of Oregon of the State Industrial Accident Commission, effective January 2, 1946.

18. Logging Safety Code of the Industrial Accident Commission of the State of Oregon, effective October 25, 1944.

19. Income tax return of Dean Hutchens and Kathleen Hutchens for the year 1948.

20. Income tax return of Dean Hutchens and Kathleen Hutchens for the year 1949.

21. Records of receipts and disbursements of Dean Hutchens, 1949.

22. Record of wages earned by Dean Hutchens, 1948.

23. Deposition of William R. Francis.

24. (To be furnished): Payroll records showing wages earned by Dean Hutchens prior to ..... , 1948.

Defendant, C. D. Johnson Lumber Corporation,  
Exhibits

1. Logging contract.
2. Receipts or records showing a portion of crane engineer's wages paid by Logger.
3. Payroll records of Francis.
4. Copy of ruling of State Industrial Accident Commission respecting status of deceased.
5. Payment records of Francis.
6. Photographs.

As Between Defendant C. D. Johnson Lumber Corporation and Third-Party Defendant William R. Francis, the following are the Admissions, Contentions, and Issues Raised by the Respective Parties:

AGREED STATEMENT OF FACTS  
IN CONTROVERSY

I.

Prior to the accident resulting in the death of plaintiff's decedent, third-party plaintiff, herein-



after referred to as "Johnson Company," and third-party defendant, hereinafter referred to as "Francis," entered into a contract for the logging and delivery by Francis to Johnson Company at Toledo, Oregon, of certain timber owned by Johnson Company. A copy of the contract is identified herein as Third-Party Defendant's Exhibit 1.

## II.

The contract, identifying the third-party plaintiff as "Owner," and third-party defendant as "Logger," provided, among other things, as follows:

(16) Logger expressly agrees to indemnify and save Owner and Owner's property harmless of and from any and all debts, dues, claims, demands, liens, charges, or damages arising out of or connected with Logger's operations under this contract which may be asserted by any person, association, corporation, Federal government or any agency thereof, or state government or any political subdivision or agency thereof.

(17) Logger shall accept the provisions of the Workmen's Compensation Act of the State of Oregon, and shall contribute to the Oregon Industrial Accident Fund for each and all of Logger's employees. Logger shall have the option and privilege of providing insurance satisfactory to Owner in lieu of accepting said Workmen's Compensation Act and contributing to said Oregon Industrial Accident Fund.



After the execution of the contract and prior to the commencement of Francis' operations thereunder, Francis filed with the Industrial Accident Commission of the State of Oregon a statement in writing giving his name and address and describing the logging operations in which he proposed to engage pursuant to his said contract with Johnson Company. Thereafter Francis contributed regularly to the Industrial Accident Fund and otherwise complied with the requirements of the Workmen's Compensation Law so as to extend its coverage and benefits to himself and his logging employees.

### III.

On and prior to the date of his death, plaintiff's decedent was engaged in hauling logs from the site of Francis' logging operation to Johnson Company's millpond in Toledo. He owned, operated and maintained the truck used in this connection, was paid according to the quantity of logs hauled, and was free to and did haul for other loggers from time to time. Francis did not carry plaintiff's decedent on Francis' payroll as an employee nor did he pay for or on his account any payroll taxes.

### IV.

Subsequent to the death of plaintiff's decedent, plaintiff, as his widow, applied to the State Industrial Accident Commission for death benefits provided by the Workmen's Compensation Law to the widow of an employee killed during the course of his employment. After a hearing duly held by the

State Industrial Accident Commission, an order was entered by the Commission as follows:

“That the claim of Mrs. Kathleen Hutchens, widow of the deceased, Hollis Dean Hutchens, should be and the same is hereby rejected as there is no evidence that said deceased, Hollis Dean Hutchens, was employed subject to the provisions of the Oregon Workmen’s Compensation Law at the time of said accidental injury causing his death.”

### Issues

1. Is Francis liable to C. D. Johnson Lumber Company for any loss or damage sustained by the latter in the within action, including expenses defending same?

2. Is the C. D. Johnson Lumber Company protected by insurance? In the event of a loss here, and if determined in the affirmative, is the insurance company subrogated to the rights of Johnson under the contract?

3. What was the status of the deceased at the time of the accident and death; and, regardless of the status of deceased, was there a breach of the logging contract by Francis in failing to provide either Workmen’s Compensation or insurance which would protect Johnson?

### C. D. Johnson Contentions

1. Defendant C. D. Johnson Corporation contends that third-party defendant Francis under the

logging contract referred to above is entitled to have third-party defendant Francis save defendant C. D. Johnson harmless from the expense of defending the within action and from any loss or damage or judgment which may be entered or sustained by the said C. D. Johnson Lumber Corporation in the within action under the indemnity provision contained in said contract.

2. Johnson contends that regardless of the indemnity provision contained in said contract that third-party defendant Francis, in event of a loss or judgment entered herein against Johnson on any basis of a violation of the safety logging code or the sawmill safety code, that such loss would be a breach of the logging contract, the natural consequence of which resulted from such breach, and particularly in Francis' failure to instruct the decedent to take a position of safety after the unloading operation started and in failing to instruct the deceased not to stand between the truck and the brow log.

3. Johnson contends that it was the intention and contemplation of Johnson and Francis under the said logging contract that Francis would protect Johnson from loss in connection with all truck drivers hauling logs to Johnson, and that the contract between Hutchens and Francis was made without any permission or consent on the part of Johnson and was a breach of said logging contract; that the parties contemplated that the logs would be hauled by employees of Francis, and had the

contract been carried out by Francis using his own employees this action could not be maintained and no loss could be sustained by Johnson; that it was the intention of the parties that Francis would protect Johnson by insurance coverage if no protection was afforded by the Workmen's Compensation Act, and in this instance in employing an independent contractor who was not brought under the Workmen's Compensation Act there was a breach by Francis of the contract in failing to provide insurance protection.

4. Johnson contends that it does have a public liability policy of insurance issued by the St. Paul Mercury Indemnity Company, but that said company has undertaken the defense of this action under a full reservation of all right and without prejudice that in the event a loss is sustained herein by Johnson that the insurance company would be subrogated to all of Johnson's rights under the contract.

### Francis Contentions

1. Francis contends that he is not liable to Johnson Company for any judgment that may be returned against Johnson Company in favor of plaintiff herein or for any other loss or expense sustained by Johnson Company herein. Such judgment or loss or expense, if any is returned, would be predicated solely upon the negligence of Johnson Company or the concurring negligence of Johnson Company and plaintiff's decedent, Dean Hutchens. Plaintiff does not allege that Francis

was guilty of any negligence causing or contributing to the cause of Hutchens' death, and, therefore, liability of Francis, if any, on account of such death would be based solely upon the indemnity provision of the agreement between Johnson Company and Francis. This provision was not intended to, and in fact and law does not, indemnify Johnson Company against its own negligence.

2. Francis contends that he fully complied with the provisions of his logging contract with C. D. Johnson Lumber Company, and that any alleged breach thereof by his alleged failure to instruct Hutchens not to go between the brow log and truck during the unloading operations was not a proximate cause of any loss that Johnson might sustain because of the action brought against Johnson Lumber Company by the plaintiff, Kathleen Hutchens, herein.

3. Francis contends that he was under no obligation imposed upon him by contract with C. D. Johnson Lumber Corporation or otherwise to haul or cause Johnson's logs to be hauled by Francis' own employees rather than by independent contractors.

4. Francis further contends that any liability or loss that may result to Johnson Company on account of plaintiff's claims will be paid either by Johnson Company's public liability insurance carrier or its employers liability insurance carrier, and that Johnson Company will be saved harmless by its own insurance from any damage claimed or



awarded in this action. It is not the purpose of the indemnity provision in the agreement hereinabove set forth to impose upon Francis damages awarded against Johnson Company for its own negligence and covered by Johnson Company's own liability insurance.

5. Francis further contends that Johnson Company is not the real party in interest herein in that it is fully protected by liability insurance and that the loss or damage sustained by or imposed upon Johnson Company in this action will be paid by its insurer. Francis contends that if Johnson Lumber Company is subjected to any loss or judgment in this action such loss or judgment will be paid by said insurance company and by reason of its subrogation to Johnson's rights, if any, against Francis; St. Paul Mercury Indemnity Company is the real party in issue and Johnson Lumber Company cannot therefore maintain this third-party action or proceeding against Francis.

### Jury Trial

Timely request was made for trial by jury in the case of Kathleen Hutchens vs. C. D. Johnson Lumber Corporation, a corporation.

The foregoing pre-trial order is the result of a conference between the attorneys and the Court. It is definitive and comprehensive and isolates all of the issues of fact and law now existing between the parties. The pleadings have served their purpose and now pass out of the case. This pre-trial order

shall govern the course of the trial and shall not be changed or amended unless by consent of the parties and the Court or modified at the trial by the Court to prevent manifest injustice.

Dated this 20th day of June, 1950.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed June 20, 1950.

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[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY DEFEND-  
ANT C. D. JOHNSON LUMBER CORPO-  
RATION

I.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (1) which appears on page 8 in the pre-trial order. The E. L. A. is designed to require safe appliances and devices and this specification would not be a violation of the Act. There is no evidence to support the claimed violation and moreover plaintiff seeks to recover solely under the Act and the Act itself sets the standard of care required. A violation of some other law or code as claimed here can not be ingrafted upon the E. L. A. In short, the provisions of the Act cannot be enlarged; the remedies are entirely different. The E. L. A. strips the employer of his defenses; the other law does not.



## II.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (2) for the reasons stated above with respect to specification of negligence (1); and further, there is no evidence that this would be a violation of the E. L. A. and there is no requirement by the Act at all that signals should be given by certain designated persons.

## III.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (3). There is no evidence to support a violation of the E. L. A. with respect to this specification. There is nothing in the Act to require any particular number of workmen. The contract and other evidence shows that it was the obligation of the Logger to deliver the logs in the water. This specification of negligence is in part a repetition of specification of negligence (1).

## IV.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (4) for the same reasons stated with respect to withdrawal of plaintiff's specification of negligence (1).

## V.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (5). First for the reason that there is

no evidence under this specification to constitute a violation of the E. L. A. and no evidence to support any lack of notice to the decedent as it was his duty to give the signal to move the log and to take a safe place while that operation was being carried on.

## VI.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (6) for the same reason stated with respect to specification of negligence (1); and moreover, the Sawmill Safety Code could have no application in this matter in that there was no sawmill involved.

## VII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (7) for the reason there is no evidence to support a violation of the E. L. A. That this specification is merely a repetition of other specifications above.

## VIII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (8) in that there is no evidence to support a violation of the E. L. A. and further for the same reasons as expressed above particularly with respect to the request for the withdrawal of specification of negligence (1).

## IX.

The court is requested to withdraw from the con-

sideration of the jury plaintiff's specification of negligence (9) on the ground and for the reason that this specifies a breach of the common law and not a breach of the E. L. A. There is no evidence under this specification of negligence to show any violation of the E. L. A.

### X.

Defendant C. D. Johnson Lumber Corporation moves the court for an order directing a verdict in its favor on the grounds and for the reason there is no evidence in this case of any violation of the Oregon Employers' Liability Act to support a verdict in favor of the plaintiff. In the event the court refuses or fails to so direct a verdict without waiving the same then this defendant requests that further instructions be given to the jury.

### XI.

I instruct you that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of violating the E. L. A. of the State of Oregon in one or more of the particulars herewith submitted to you before you could allow her any recovery in this case.

### XII.

I instruct you that by a preponderance of the evidence is meant that quality of evidence which brings moral certainty to an unprejudiced mind. And as stated above the plaintiff has this burden and if she fails to prove her case by a preponder-

ance of satisfactory evidence then in that event your verdict shall be for the defendant.

### XIII.

I instruct you that the mere fact that an accident occurred here which resulted in the death of Dean Hutchens is no evidence that the defendant was negligent. The law recognizes the fact that accidents happen at times without negligence on the part of anyone; therefore, the mere fact that an accident occurred here resulting in the death of Dean Hutchens is not sufficient for you to return a verdict in favor of the plaintiff.

### XIV.

I further instruct you that if after considering the evidence you find that it is evenly balanced, that is to say that it weighs no heavier in favor of the plaintiff or in favor of the defendant, then in that event the plaintiff has failed to prove her case by a preponderance of the evidence and your verdict would be for the defendant.

### XV.

I instruct you that if you find from the evidence that the deceased was an independent contractor or an independent subcontractor that this particular action cannot be maintained by the plaintiff and your verdict would be for the defendant. This particular law is designed to apply to employees only and not to independent contractors.

## XVI.

I instruct you that if you find from the evidence that the deceased made his own working conditions, that is to say that there was a safe place for him to be while the log was being rolled into the water, then in that event there could be no recovery under the E. L. A. against this defendant as it is the duty of a person who has a safe place furnished to him to take that safe place for his own protection.

## XVII.

I instruct you that if you find from the evidence that under the Logging contract that it was the responsibility of the Logger to deliver the logs in the water, then, in that event, the logger would be in control of the log until it was dumped in the water and it would be up to the Logger to comply with the provisions of the E. L. A.

## XVIII.

I instruct you that if you find that the crane engineer's wages were paid by the Logger or some deducted from the remittances made to the Logger on account of the crane engineer's wages while assisting in the unloading of the log in question, you could consider this along with other evidence as to whether the truck driver or Logger was in charge of the unloading operation.

## XIX.

I instruct you that if you find from the evidence that the truck driver was in charge of the unloading operation, then, in that event, it was up to the truck

driver to see that the provisions of the E. L. A. were complied with.

## XX.

I instruct you that if you find from the evidence that the truck driver made his own working conditions and was responsible for his own movements and actions and the place where he could stand while the log truck was being unloaded then in that event there would be no violation of the E. L. A. by the defendant C. D. Johnson Lumber Corporation and your verdict would be for the defendant.

## XXI.

I instruct you that the defendant was not an insurer of the safety of the deceased Dean Hutchens and could be held liable in this case only if you find that the defendant was in violation of the E. L. A. in one or more of the particulars on which I have instructed you. However, in this respect, I caution you and further instruct that the Act would have no application and no recovery could be had by the plaintiff unless the deceased was working as an employee at the time of the accident. In other words, if you find that he was an independent contractor the Act would not apply. I further instruct you that if you find that the deceased was an employee of Wm. R. Francis and if you should further find that Francis, the Logger, had the responsibility of delivering the logs in the water and was in charge of the unloading operation of the log through his employee, the deceased Dean Hutchens, and that the negligence of Francis



in failing to comply with the provisions of the E. L. A. or in some other particular negligence as charged, and that such negligence was the proximate cause of the accident and death of the deceased, then in that event your verdict would be for the defendant C. D. Johnson Lumber Corporation and against the plaintiff.

## XXII.

I instruct you that if you find from the evidence that the proximate cause of the accident and death was the result of the negligence of the Logger, Wm. R. Francis, then, in that event, the plaintiff could not recover against defendant C. D. Johnson Lumber Corporation and your verdict would be in favor of defendant C. D. Johnson Lumber Corporation.

## XXIII.

I instruct you that the Logging Safety Code of the State of Oregon provides that all bunker chains and binder chains shall so be attached that they can be released from the side opposite to the brow log and if under the evidence you find in this case that the chains used could not be detached from the side opposite to the brow log, then in that event this provision of the logging code would have been violated and in this connection you are instructed that it was the duty of the Logger Francis to see that this provision was complied with in the event the deceased was an employee of Francis; and you are further instructed that it would be the duty of the deceased to see that this provision of the safety code was complied with in the event you



would find that the deceased was an independent contractor and not an employee. In short, it would be the obligation of either Francis, the Logger, or the deceased, if he were an independent contractor, to comply with this safety rule and a failure to comply with the same would be negligence as a matter of law. And if you should further find that the failure to comply with this safety rule was the sole proximate cause of the accident, then in that event there could be no recovery here and your verdict would be for the defendant.

#### XXIV.

I instruct you that the Logging Safety Code of the State of Oregon prohibits anyone from going between a load of logs and a brow log and therefore if you find in this case that the deceased went between a log load and the brow log then he would be in violation of this provision of the safety code and you are further instructed that a violation of this provision of the safety code would be negligence as a matter of law and if you further find that this negligence was the sole proximate cause of the accident and death then in that event your verdict would be for the defendant and against the plaintiff.

#### XXV.

I instruct you that the deceased Dean Hutchens had the duty of exercising care for his own safety. I further instruct you that if you find from the evidence that there was a safe place for the deceased to stand while the log was being unloaded and that

the deceased failed to take such safe position for his own safety, then in that event you would find that the deceased was negligent and if such negligence was the sole, proximate cause of the accident and death, then in that event your verdict would be for the defendant.

### XXVI.

I instruct you that the law presumes that the parties here were in the exercise of ordinary care and in this respect the law presumes that the logging truck and the bunks thereon were equipped with chains which would enable the deceased here to unfasten the bunk blocks from the side of the truck opposite the brow log and that it would not be necessary for him to go between the brow log and the loaded truck in order to release the bunk blocks or other fastening chains.

### XXVII.

I instruct you that if you find from the evidence the deceased left a place of safety and placed himself in a perilous position between the log being unloaded and the brow log after having given the signal to the crane engineer to unload the log this would constitute negligence on the part of the deceased and if you further find that deceased was negligent in this respect and that such negligence was the sole proximate cause of the accident, then in that event your verdict would be for the defendant and against the plaintiff.

## XXVIII.

I instruct you that the crane engineer was entitled to rely upon the deceased to observe the law and to exercise reasonable care for his own safety and in this respect he was entitled to rely upon the deceased to observe the safety code rule and not go between the log load and the brow log.

## XXIX.

I instruct you that the equipment, chains, and parts, bunk blocks, and truck were under the control of the deceased and not under the control of the defendant C. D. Johnson Lumber Corporation and if you find from the evidence that there was a defect in the manner in which the chains were applied or the bunk blocks set and that such defect was the sole and proximate cause of the accident and death, defendant C. D. Johnson Lumber Corporation would not be responsible therefor and your verdict would be for the defendant.

## XXX.

I instruct you that if you find from the evidence that the deceased Dean Hutchens was an employee of Francis the Logger, then Francis would be responsible for the truck and its equipment including the chains and the bunk blocks and if you find that Francis was negligent with respect to such equipment, chains and bunk blocks furnished and that such negligence, if any, was the sole proximate cause of the accident and death of Dean Hutchens, then in that event plaintiff could not recover here and your verdict would be for the defendant.

## XXXI.

I instruct you that if you find from the evidence that the accident and death of the deceased resulted through some defect in the truck equipment which the deceased had charge of and that was the sole proximate cause of the accident and death, then in that event the defendant would have no responsibility here and your verdict would be for the defendant.

## XXXII.

I instruct you that the E. L. A. is designed to furnish protection to employees with respect to equipment and appliances and machinery used and it is only in case where an accident results through the failure of an employer to use every care and safeguard with respect to the machinery, equipment, or other device resulting in injury or death that gives rise to a cause of action under said Act. In short, the Act does not nor does it intend to furnish protection for human failure only.

## XXXIII.

I instruct you that if you find from the evidence that the deceased placed himself in a position between the log load and the brow log, that this would be in violation of the Logging Safety Code which would be negligence in and of itself. I further instruct you that if the deceased placed himself in this position due to some defective equipment or chain attachment on the truck in which the deceased was in charge of or Francis the Logger was in charge of or responsible for, this would not con-

stitute a violation of the E. L. A. by defendant C. D. Johnson Lumber Corporation as it is the person in charge of and responsible for the equipment that has the duty of complying with the provisions of the Act and no recovery here could be had against the defendant for violation of the Act by Francis or the deceased Dean Hutchens.

#### XXXIV.

I instruct you that if you find from the evidence that the deceased Dean Hutchens carried on his work in and around the truck in connection with the unloading of the log by himself and without the intermingling in that work of any employees of C. D. Johnson Lumber Corporation, then in that event the E. L. A. would have no application and your verdict would be for the defendant.

#### XXXV.

I instruct you that if you find from the evidence that the deceased Dean Hutchens was in charge of the particular work in which he was engaged at the time of the accident and death, then it was his statutory duty to see that the requirements of the E. L. A. were complied with and in the event he failed to perform his statutory duty no recovery could be allowed here and your verdict would be for the defendant. *Robbins v. Irwin*, 180 Or. 667, p. 679.

#### XXXVI.

I instruct you that liability under the E. L. A. cannot be predicated upon the mere fact that the

work involved risk or danger. The plaintiff must go further and show a breach of duty on the part of the defendant and therefore if you find from the evidence in this case that the accident and death here did not result through the failure of any device, apparatus or other equipment of the defendant C. D. Johnson Lumber Corporation, then in that event plaintiff has failed to establish a case and your verdict would be for the defendant. *Ferretti v. S. P. Co.*, 154 Or. 97.

### XXXVII.

I instruct you that if you find from the evidence that the deceased could or should have performed his work in a safe place and was not required to go between the log load and the brow log and that his failure to carry on his work in a safe place rather than putting himself in a dangerous position was negligence and such negligence was the sole proximate cause of the accident, then in that event your verdict would be for the defendant and against the plaintiff.



In the District Court of the United States  
For the District of Oregon

Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Defendant.

### VERDICT

We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant, and assess plaintiff's damage at \$68,377.20.

Dated this 22nd day of June, 1950.

/s/ TIMOTHY E. O'LEARY,  
Foreman.

[Endorsed]: Filed June 22, 1950.

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[Title of District Court and Cause.]

### MOTION FOR ORDER DIRECTING ENTRY OF JUDGMENT

Comes now the plaintiff, by and through William A. Babcock, one of her attorneys, and moves the Court for a determination that there is no just reason for delay in the entry of judgment upon the claim of Kathleen Hutchens, plaintiff, vs. C. D.



Johnson Lumber Corporation, defendant, and for the entry of an order directing the Clerk of the Court to enter a judgment for plaintiff on said claim. In support of said motion plaintiff represents and alleges as follows:

This cause was regularly placed upon the calendar for trial and reached in its regular order for trial, and separate trials were ordered by the Court on the claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and the third-party claim of C. D. Johnson Lumber Corporation, third-party plaintiff, vs. William R. Francis, third-party defendant. The claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, came on regularly for trial on June 20, 1950, plaintiff, Kathleen Hutchens, appearing in person and by her attorneys, Emerson U. Sims and William A. Babcock, and defendant, C. D. Johnson Lumber Corporation, appearing by James Arthur Powers, its attorney. A jury trial was had, and the jury rendered a verdict in favor of the plaintiff and against the defendant.

The claim of the third-party plaintiff, C. D. Johnson Lumber Corporation, vs. third-party defendant, William R. Francis, was based upon an alleged agreement of indemnity on the part of the said third-party defendant for any damages arising out of or connected with the operations of William R. Francis. Any liability on the part of William R. Francis will not arise until a loss has been suffered by the C. D. Johnson Lumber Corporation. The entry of judgment on verdict of the jury in favor

of the plaintiff, Kathleen Hutchens, on her claim against C. D. Johnson Lumber Corporation, is a pre-requisite to the claim of C. D. Johnson Lumber Corporation vs. William R. Francis.

There is no just reason for delay in the entry of judgment on the verdict in favor of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and the entry of such judgment will in no way prejudice the rights of either the defendant and third-party plaintiff, C. D. Johnson Lumber Corporation, or the third-party defendant, William R. Francis.

Wherefore, the plaintiff prays for an order of the Court determining that there is no just cause for delay in the entry of a final judgment on the verdict in favor of the plaintiff, Kathleen Hutchens, and against the defendant, C. D. Johnson Lumber Corporation, and directing the Clerk of the Court to enter a judgment on the verdict.

Dated this 23rd day of June, 1950.

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-  
STANDING VERDICT OF JURY

Comes now defendant C. D. Johnson Lumber Corporation and moves the court for the entry of judgment in its favor notwithstanding verdict of the jury on the grounds and for the reasons following:

(1) There is no specification of negligence in the pre-trial order which would constitute violation of the Employers' Liability Act of the State of Oregon.

(2) There is no competent evidence in this case to support a verdict in favor of the plaintiff for any claimed violation of the Employers' Liability Act.

(3) The only possible evidence of negligence in this case would be for common law negligence or possibly a breach of some Oregon statute which is not part of the Oregon Employers' Liability Act.

(4) There is no evidence in this case to show any violation on the part of this defendant of the Employers' Liability Act in that there is no evidence of any failure to use every device, machinery and other apparatus as required by the Oregon Employers' Liability Act.

(5) There is no evidence showing that the status of the decedent at the time and place of his death was such as to bring him within the class of persons

entitled to protection under the Employers Liability Act.

Wherefore, defendant asks that judgment now be entered in its favor and plaintiff's complaint dismissed.

/s/ JAMES ARTHUR POWERS,  
Attorney for Defendant C. D. Johnson Lumber  
Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 29, 1950.

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[Title of District Court and Cause.]

### MOTION FOR A NEW TRIAL

Comes now the Defendant C. D. Johnson Lumber Corporation and moves the Court for an order granting this defendant a new trial on the grounds and for the reasons as follows:

(1) Prejudicial error occurred at the trial in the Court's failure to submit to the jury this defendant's theory of defense concerning the status of the decedent at the time of the accident and death and particularly in failing to submit to the jury the question of whether decedent was an independent contractor; and secondly, in failing to submit to the jury the question of whether there was an intermingling in the carrying out of the particular operation between employees of this defendant and decedent as an employee of a third party.

(2) In erroneously instructing the jury to determine an issue of negligence that was not in the pre-trial order, namely the matter of what the Court referred to as a conflict in the evidence as to what type of signal was given. That is to say, a signal to unload the log or a signal that decedent was going between the truck load and the brow log—and to hold everything. (The so-called negligent misinterpretation referred to by plaintiff's counsel.) It is submitted that this was **prejudicial error** of the highest sort as there was no contention of negligence made by the plaintiff on this ground. No specification of negligence on this ground and in fact no competent evidence for the jury to consider as to whether the defendant was so negligent. This instruction of the Court on an issue foreign to those specified in the pre-trial order, we submit, was highly prejudicial to this defendant's right to a fair trial especially in view of the argument of plaintiff's counsel to the jury which went clear beyond the record in this respect. So much so that he likened the act of the crane operator to the acts of the asserted murderers now getting front page headlines in connection with the trial at Vancouver, Washington.

(3) In failing to give defendant's requested instruction concerning the Logging Safety Code which prohibits men from going between a loaded truck and the brow log. This was prejudicial error as it completely deflated argument made by defendant's counsel on this point and deprived the defendant of its theory of defense. The jury not being in-



structed on this important provision of the Logging Safety Code had the effect of stripping the defendant of this very important defense.

(4) The Court's failure to instruct the jury as requested by defendant that if the decedent here made his own working conditions, then in that event he would not be entitled to the protection of the Employers' Liability Act.

(5) In failing to instruct the jury that if the decedent was furnished a safe place to stand while the log was being unloaded, and, if he left that safe place, and took a position of danger, then the Employers' Liability Act of Oregon would not apply. This instruction as requested by defendant also presented defendant's theory of the case and failure to give this instruction we submit was substantial error and prejudicial to defendant.

(6) Failing of the Court to withdraw from the consideration of the jury any violation of the Logging Code as a basis for recovery under the Employers' Liability Act and in giving plaintiff's requested instructions to the jury that they should consider whether the defendant was negligent respecting same and allowing the jury under the instructions to return a verdict in favor of the plaintiff for a violation of the Employers' Liability Act based on other legal duties not contained therein and thus enlarging the provisions of the Employers' Liability Act by grafting thereon other rules and laws not a part thereof.

(7) The verdict is excessive and rendered under the influence of passion and prejudice and secondly for erroneous instructions given by the Court to the jury respecting damages which did not correctly state the rule governing the measure of damages in this type of action and coupled with that in instructing the jury on percentages with respect to contributory negligence which referred to 10 per cent negligence on the part of the deceased and 25 per cent negligence on the part of the deceased without offsetting it by an instruction 90 per cent negligence on the part of the deceased and thus permitting the jury to get the idea the Court's feeling of the decedent's negligence was not more than 50 per cent, and possibly only 10 or 25 per cent.

(8) In failing to instruct the jury as requested by defendant that the decedent was negligent as a matter of law in going between the truck load and the brow log, and that if such negligence was the sole proximate cause of the accident, no recovery could be had. (Defendant's requested instruction No. 24.)

(9) In failing to instruct the jury as requested that if the negligent equipment on the truck such as the chains or the manner in which it was loaded or attached were defective, that this would not be the responsibility of defendant C. D. Johnson Lumber Corporation but would be the responsibility of the decedent or the third-party logger.

(10) In failing to instruct the jury as requested that they should consider who was in charge of the



unloading of the truck and if they found the decedent was in charge of the unloading of the truck that the duty would be upon the decedent to see that the provisions of the Employers' Liability Act were complied with. (Defendant's requested instruction No. 19.) And in this same connection in failing to give defendant's requested instruction No. 18 in determining that question as to who was paying the crane engineer's wages.

(11) In instructing the jury as the plaintiff requested with respect to the specification of negligence No. 4 with respect to duty of the defendant C. D. Johnson Lumber Corporation to have supervisors and give instructions in accordance with the provisions of the Logging Safety Code. This clearly could not be ingrafted upon the Employers' Liability Act and moreover the Logging Safety Code in this respect relates to the employer of the particular employee and does not relate to third-party employers nor is it intended to require a third-party employer to give instructions or to supervise the employees of another employer.

(12) In failing to instruct the jury that the Employers' Liability Act of Oregon and the risk and danger referred to thereunder applies only to the particular place and the particular work being done at the time and place of the accident and to make it clear to the jury that if the decedent was performing no work at the time of the accident and that there was a safe place furnished for him to stand, then no recovery could be had.

Wherefore, defendant respectfully submits that the foregoing errors are substantial and that they were prejudicial to this defendant and that a new trial should be ordered so that the issues may be properly submitted to the jury so that this defendant would have a fair and legal trial.

/s/ JAMES ARTHUR POWERS,  
Attorney for Defendant C. D. Johnson Lumber  
Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 29, 1950.

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[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF  
OPINION ON MOTION FOR NEW TRIAL

Comes now the plaintiff, by and through Emerson U. Sims and William A. Babcock, her attorneys, and moves the Court for a reconsideration of its decision and opinion made in the above matter on December 5, 1950, and particularly that portion of said opinion and decision providing as follows:

“\* \* \* Therefore, if the plaintiff, on or before December 20, 1950, shall serve upon opposing counsel and file in this case a remittitur of that amount upon the verdict found and returned herein, the motions for a new trial and for a judgment notwithstanding the verdict will be denied and overruled and a judgment based upon such verdict as reduced may be entered

for the remaining sum of \$46,500.00 with costs; but, if such remittitur be not so served and filed on or before December 20, 1950, the motion for a new trial will be allowed. \* \* \*”

Plaintiff further moves the Court that, pending hearing, argument and decision on this motion, the Court enter an order extending the time within which plaintiff is to be permitted to file a remittitur until after decision on this motion and a reasonable time thereafter.

This motion is made and based upon the following grounds:

(1) The decision and opinion of the Court to the effect that it will enter an order allowing a new trial in this case unless the plaintiff files a remittitur in the amount of \$21,877.20 on or before December 20, 1950, presents a question which was not argued before the Court and concerning which the view and position of the plaintiff have not heretofore been expressed.

(2) This action was brought under the Employers' Liability Act of the State of Oregon, for damages for the death of plaintiff's husband, Dean Hutchens, and the rights of the plaintiff and the duties of the defendant herein arise under the Constitution and Laws of the State of Oregon.

(3) The United States District Court, in an action brought under the laws of the State of Oregon based upon diversity of citizenship of the parties, is bound to follow the law of the State of

Oregon to determine the right of the plaintiff to recover and the nature and extent of such right, and the United States District Court is without power to take any action which substantially affects the enforcement of the right as given by State law.

(4) By virtue of the provisions of Article VII, Section 3, of the Constitution of the State of Oregon, and the decisions of the Supreme Court of the State of Oregon interpreting said Article and Section, the Trial Court, in an action arising under the laws of the State of Oregon, is without power to set aside a verdict of a jury on the ground that it is excessive, or to reduce the amount of said verdict or to condition the granting of a new trial on the filing of a remittitur by the plaintiff of a portion of the verdict.

(5) The right of the plaintiff to a trial by jury without re-examination of said verdict by the Court under the laws of the State of Oregon is a matter of substance which significantly affects the rights of the plaintiff and the results of the litigation, and is controlling upon this Court.

(6) This Court was without power to condition the denial of the motion for new trial upon a remittitur of any portion of the verdict.

(7) Assuming that the Court had power to reduce the amount of the verdict on the ground that it was excessive, or to direct the filing of a remittitur as a condition of denying the motion for new trial, the Court erred in directing the filing of a remittitur

for the amount of \$21,877.20 for the reason that there is no evidence to support such amount and the Court's action in arriving at said amount is purely arbitrary and capricious.

Dated this 18th day of December, 1950.

/s/ EMERSON U. SIMS,

/s/ WM. A. BABCOCK,

Of Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 19, 1950.

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[Title of District Court and Cause.]

### ORDER FEBRUARY 9, 1951

Now at this day It Is Ordered that the motion of the plaintiff for reconsideration of the opinion rendered herein be, and is hereby, denied.

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[Title of District Court and Cause.]

### REMITTITUR

Comes now the plaintiff and files this as and for a remittitur herein of the sum of \$21,877.20, upon the verdict found and entered by the jury on June 21, 1950.

This remittitur is filed pursuant to the opinion of the Court of December 5, 1950, requiring said remittitur as a condition of the Court's denial of

defendant's motion for new trial, to which action by the Court plaintiff objects and excepts for the reasons set forth in plaintiff's motion for reconsideration previously filed herein.

This remittitur is filed without prejudice, in the event the defendant appeals from the judgment entered pursuant to such remittitur, to the rights of the plaintiff to appeal the action of the Court in conditioning its order denying the motion for new trial upon the filing of such remittitur.

Dated this 19th day of February, 1951.

/s/ MRS. KATHLEEN  
HUTCHENS,

/s/ EMERSON U. SIMS,

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff.

Approved this 19th day of February, 1951:

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 19, 1951.



[Title of District Court and Cause.]

ORDER DENYING MOTION FOR A  
NEW TRIAL

This matter having come on regularly to be heard before the Honorable Gus J. Solomon, Judge, upon Motion for a New Trial heretofore filed by the defendant, C. D. Johnson Lumber Corporation, plaintiff appearing by Emerson U. Sims and William A. Babcock of her attorneys, and defendant appearing by James Arthur Powers, its attorney, and the court having heard arguments of counsel and having considered the briefs submitted by counsel;

And the court having on December 5, 1950, given its oral opinion in said matter, providing for the denial of said motion upon the plaintiff filing a remittitur of the verdict of the jury in the amount of \$21,877.20, and allowing plaintiff until December 20, 1950, to file said remittitur;

And the plaintiff having, prior to said date, filed its motion for reconsideration of the opinion on motion for new trial, and an order having been duly made and entered extending the time for the filing of a remittitur until ten days after the hearing and decision of the court on said motion;

And the court having, on February 9, 1951, after hearing on said motion and consideration of the briefs filed by counsel, entered an order denying said motion for reconsideration;

And plaintiff having on the 19th day of February, 1951, filed her remittitur pursuant to the opinion



of the court in the amount of \$21,877.20, and said remittitur having been approved by the court; now therefore;

It Is Hereby Ordered that the motion for a new trial heretofore filed by the defendant, be and the same hereby is overruled and denied.

Dated this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT

This matter having regularly come on to be heard before the Honorable Gus J. Solomon, Judge, upon the Motion for Judgment Notwithstanding the Verdict of Jury heretofore filed by the defendant, C. D. Johnson Lumber Corporation, plaintiff being represented by Emerson U. Sims and William A. Babcock of her attorneys, and defendant being represented by James Arthur Powers, its attorney, and the court having heard arguments of counsel and having considered the briefs submitted by counsel, and being fully advised in the premises;

It Is Hereby Ordered that the said Motion for

Judgment Notwithstanding Verdict of Jury be and the same hereby is denied.

Dated this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

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[Title of District Court and Cause.]

## ORDER DIRECTING ENTRY OF JUDGMENT

This matter having come on regularly to be heard before the Honorable Gus J. Solomon, Judge, on motion of the plaintiff for a determination that there is no just reason for delay in the entry of judgment upon the claim of Kathleen Hutchens, plaintiff vs. C. D. Johnson Lumber Corporation, defendant, and for the entry of an order directing the Clerk of the Court to enter a judgment for plaintiff on the verdict made and entered in said cause, plaintiff appearing by Emerson U. Sims and William A. Babcock, of her attorneys; defendant, C. D. Johnson Lumber Corporation, appearing by its attorney, James Arthur Powers, and third-party defendant William R. Francis, appearing by his attorneys, Hart, Spencer, McColloch, Rockwood & Davies, and a hearing having been held upon said motion, and the court having heretofore denied motions for new trial and judgments notwithstanding verdict filed by defendant, C. D. Johnson Lumber Corporation;

And the plaintiff, having pursuant to the direction of the court as a condition for the denial of the motion for new trial, filed her remittitur in the sum of \$21,877.20, which remittitur has been approved by the court, and the court being fully advised in the premises; and

It appearing that there is no just reason for delay in the entry of judgment upon the verdict in favor of the plaintiff, Kathleen Hutchens, against the defendant, C. D. Johnson Lumber Corporation;

It Is Hereby Adjudged and Determined that there is no just cause for delay in the entry of said judgment; and

It Is Hereby Ordered and the Clerk of the Court is directed, that judgment shall be entered immediately upon the verdict of the jury and the remittitur of the plaintiff in favor of the plaintiff, Kathleen Hutchens, against the defendant, C. D. Johnson Lumber Corporation, in the amount of \$46,500, together with costs and disbursements of the plaintiff.

Dated this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

[Title of District Court and Cause.]

ORAL OPINION

(12-5-50)

Gus J. Solomon, Judge.

The case of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and W. R. Francis, third-party defendant, is now before the Court on the motion of plaintiff for an order directing entry of judgment based upon the verdict of a jury awarding plaintiff damages against the defendant in the sum of \$68,377.20, and upon defendant's motions for a judgment notwithstanding the verdict and for a new trial.

In support of its motions, defendant contends that the Court erred in excluding evidence of the deceased's employment status and in failing to submit to the jury the question of whether the deceased was an independent contractor or an employee of W. R. Francis, the third-party defendant. Defendant maintains that, if the deceased were an independent contractor, he would not be entitled to the benefits and protection of the Oregon Employers' Liability Act; therefore, the failure of the Court to permit evidence on his employment status and its failure to submit such question to the jury constituted error.

I have carefully reviewed the evidence, as well as the admissions made in the pre-trial order, and I believe that the evidence and such admissions show that:

The defendant owned and operated the unloading dock and the unloading equipment on such dock at the time of the accident.

On the date of the accident, there were approximately twenty trucks hauling logs to this dock and each truck averaged about four trips a day.

All logs unloaded on this dock had been purchased, or were being purchased, by the defendant or were cut from timber which belonged to the defendant and which had been logged by contractors for and on behalf of the defendant. Most of the trucks using such unloading dock and facilities were operated by employees of such contractors, but there were some trucks which were operated by the owners thereof who were paid by these contractors on a trip or footage basis. All trucks, however, whether they were operated by employees or by individual owners, performed identical services and the unloading at the dock was done pursuant to instructions from the unloading engineer, an employee of defendant who supervised and had charge of the unloading dock and all unloading operations thereon.

In other words, all the workmen using defendant's unloading dock and facilities, including defendant's employees, employees of contractors, and individuals who were hauling logs under contract for such contractors, were lawfully on the defendant's premises, either by reason of their employment or because of contract, and all of them were engaged in a common purpose in which the defendant had an interest and were exposed to the dangers



of such work, which was supervised by defendant's unloading engineer.

The Oregon cases interpreting Sec. 102-1601-2 OCLA hold that, even though the benefits and protection of the Employers' Liability Act do not extend to the general public as such, it is not necessary for the injured workman to be an employee of the particular owner and operator of dangerous machinery or equipment or engaged in the hazardous work of such owner in order to come within the purview of the Act. Employees of persons other than the owner, whose lawful duties require them to be about or work with dangerous machinery or equipment, and employees of customers of such owner, who are lawfully on the owner's premises and who use such equipment while they engage in their occupations, are protected by the Act. *Rorvick vs. North Pacific Lumber Co.*, 99 Ore. 58, and *Coomer vs. Supple Investment Co.*, 128 Ore. 224.

Even though many of the cases refer to the fact that the injured workman was an employee, coverage under the Act was dependent upon whether an injured workman's duties required him to be about the machinery or hazardous work of the owner in the accomplishment of a common purpose in which the owner had an interest. In my opinion, it is immaterial whether an injured workman is required to be on the premises and perform work by reason of a master and servant relationship with either the owner or contractor or because of a contract with either of them. It is the nature of the work and not the technical legal status of the workman which controls.



Under the more recent cases, it has been held that persons in a supervisory capacity, or persons who control the work or operations in which they are engaged, are not covered by the Act. In my instructions to the jury, I recognized this rule by instructing the jury that, if they found that the deceased made his own working conditions, he would not be entitled to the benefits of the Act.

Many of the other specifications of error set forth in defendant's motions for judgment notwithstanding the verdict and for a new trial concern themselves with the failure of the Court to give certain instructions. An examination of the instructions reveals that, in most instances, the substance of such requested instructions was actually given. As to the other specifications, I find that they are without merit.

I am, however, concerned with the size of the verdict. At the time of the fatal accident, the deceased was 21 years of age. His wife was 23 years of age. His net taxable income for the year 1948, after he had acquired the truck, was only \$1,256.28 and, for the first eight months in 1949, his total net income from all sources was only \$2,127.59. His total net income for 1949, if he had lived and his income had continued on the same basis during the winter months, would have been approximately \$3,000.00.

There was evidence that the deceased was a hard-working and thrifty young man, and his future earnings might have been much greater. However,

the pecuniary loss to the wife is not to be measured by the full net earnings of the husband.

I do not believe that the amount of the verdict is so disproportionate to the plaintiff's loss as to establish passion or prejudice in the jury's deliberations or to be shocking to the Court's conscience. I also recognize that it is within the province of the jury to determine the amount of damages and that a trial judge should only rarely and reluctantly disturb the jury's findings with respect thereto. However, I feel that, when the verdict of the jury is clearly excessive, it is the duty of the trial judge to refuse to permit such an award to stand.

I have carefully considered all of the evidence touching upon damages and I believe that the verdict of the jury is excessive to the extent of \$21,877.20. Therefore, if the plaintiff, on or before December 20, 1950, shall serve upon opposing counsel and file in this case a remittitur of that amount upon the verdict found and returned herein, the motions for a new trial and for a judgment notwithstanding the verdict will be denied and overruled and a judgment based upon such verdict as reduced may be entered for the remaining sum of \$46,500.00 with costs; but, if such remittitur be not so served and filed on or before December 20, 1950, the motion for a new trial will be allowed. Attorneys for plaintiff will prepare appropriate instruments in accordance with this oral opinion.

[Endorsed]: Filed March 23, 1951.

[Title of District Court and Cause.]

ORAL OPINION

(2-9-51)

Gus J. Solomon, Judge.

In the case of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and W. R. Francis, third-party defendant, the jury awarded plaintiff damages against defendant, C. D. Johnson Lumber Corporation, in the amount of \$68,377.20. Thereafter, this defendant filed motions for judgment notwithstanding the verdict and for a new trial. On December 5, 1950, I rendered an opinion denying defendant's motions on condition that plaintiff file a remittitur in the amount of \$21,877.20 on or before December 20, 1950. On December 18, 1950, plaintiff filed a motion for reconsideration of such opinion. Plaintiff contends that a Federal District Court has no power to set aside a verdict of a jury, on the ground that it is excessive, or to condition the denial of the new trial on the filing of a remittitur by the plaintiff of a portion of the verdict, in those cases before it solely by reason of diversity of citizenship where the state law governing the substantive rights of the parties denies to its courts such power.

In order to permit a full examination of the issues raised by this motion, the Court entered an order on December 19, 1950, granting plaintiff 10 days after entry of the Court's decision on such motion,

if the same were denied, within which to file a remittitur.

All of the decisions cited by the plaintiff in support of her motion have been carefully examined and none of them, in the Court's opinion, alter or impair the power of a Federal District Judge to require a remittitur of the excessive portion of a jury's verdict as a condition to the denial of a new trial.

Rule 59 (a) (1) of the Federal Rules of Civil Procedure, authorizes the granting of a new trial "in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

On numerous occasions, the Supreme Court of the United States has recognized the power of a trial judge to condition the denial of a new trial on a remittitur. *Northern Pacific Railroad Co. vs. Herbert*, 116 U. S. 642 and *Dimick vs. Schiedt*, 293 U. S. 474.

Neither *Erie R. Co. vs. Tompkins*, 304 U. S. 64, nor any of the later Supreme Court decisions, which have construed such case and its underlying policy, has impaired that power. It is a problem of Federal Court procedure and is not dependent upon the law of the state which governs the substantive rights of the parties. *Rice vs. Union Pacific R. Co.*, 82 F. Supp. 1002.

The other ground for plaintiff's motion is that the Court acted arbitrarily and capriciously in or-

dering a reduction of the recovery to \$46,500.00 as a condition to its denial of a new trial.

I find that this ground is also without merit.

Plaintiff's motion for reconsideration is therefore denied.

[Endorsed]: Filed March 23, 1951.

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In the District Court of the United States  
for the District of Oregon

Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Defendant and Third-Party Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

### JUDGMENT

This cause having been regularly placed upon the calendar for trial and having reached its regular order for trial, and separate trials having been ordered by the Court on the claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and on the third-party claim of C. D. Johnson Lumber Corporation, plaintiff, vs.



William R. Francis, third-party defendant, and the claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, having come on regularly for trial on June 20, 1950, plaintiff, Kathleen Hutchens, appearing in person and by her attorneys, Emerson U. Sims and William A. Babcock, and defendant, C. D. Johnson Lumber Corporation, appearing by James Arthur Powers, its attorney, and a jury trial having been had and the jury having rendered a verdict in favor of the plaintiff and against the defendant for \$68,377.20;

And the Court having heretofore denied motion of the defendant, C. D. Johnson Lumber Corporation, for judgment notwithstanding the verdict, and having denied the motion of said defendant for a new trial subject to the filing by the plaintiff of a remittitur of \$21,877.20 of verdict rendered by the jury, and the remittitur in such amount having been filed by the plaintiff and approved by the Court;

And the Court having determined that there is no just cause for delay in the entry of judgment and having ordered and directed the Clerk to enter a judgment on said verdict,

Now, Therefore, on motion of William A. Babcock, of attorneys for said plaintiff,

It Is Adjudged and Determined that the plaintiff, Kathleen Hutchens, do have and recover of the C. D. Johnson Lumber Corporation, defendant, the sum of \$46,500.00, together with the costs and disbursements of this action, taxed and allowed at the sum of \$455.11, making a total judgment of



\$....., and that plaintiff have execution therefor.

Witness the Honorable Gus J. Solomon, Judge of said Court, and my hand and the seal of said Court, this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that the C. D. Johnson Lumber Corporation, a corporation, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and the whole thereof, entered in this action on the 20th day of February, 1951, and which judgment is now final.

/s/ JAMES ARTHUR POWERS,  
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING TRANSMISSION  
OF ORIGINAL EXHIBITS

This matter having been heard by the Honorable Gus J. Solomon, Judge, on motion of the defendant C. D. Johnson Lumber Corporation, and the Court being of the opinion that the original exhibits should be sent to the Court of Appeals for the Ninth Circuit in lieu of copies, and the Court being fully advised in the premises,

It Is Hereby Ordered and the Clerk of the Court is directed to send to the Clerk of the Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this action together with all original exhibits marked for identification only and not received in evidence for use on said defendant's appeal in their original form and not to be printed in transcript of record on appeal.

Dated at Portland, Oregon, this 24th day of April, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed April 24, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT WILL RELY ON APPEAL

Appellant C. D. Johnson Lumber Corporation  
will rely on the following points on appeal:

I.

1. The Court erred in refusing to grant defendant's motions for a directed verdict and for judgment notwithstanding the verdict, upon the ground that there was no competent evidence in this case to support a verdict in favor of the plaintiff for any claimed violation of the Oregon Employers' Liability Act since the said Act was inapplicable where the deceased left a safe place provided for the doing of his work and contrary to law entered a place of danger.

2. The Court erred in failing to charge the jury that to apply the Oregon Employers' Liability Act in this action it was necessary to first determine the nature of deceased's employment status, specifically whether or not he was an independent contractor or an employee.

3. The Court erred in refusing to admit in evidence a ruling of the Oregon State Industrial Accident Commission as to the deceased's employment status being that of an independent contractor.

4. The Court erred in failing to charge the jury that if the Oregon Employers' Liability Act was

applicable in this action the jury must then decide whether the deceased was the person in charge of the unloading of his truck within the meaning of the said Act because person in charge of said operation is responsible for compliance with said Act and is not entitled to claim a violation thereof.

(a) This Court further erred in failing to charge the jury that in determining who was in charge of the said unloading operation they must consider who paid the crane engineer for the said unloading.

(b) The Court further erred in failing to charge the jury that depending on whether or not the deceased was an employee of William R. Francis or an independent contractor then either William R. Francis or the deceased and not the defendant were responsible for any defective device on the deceased's truck.

5. (a) The Court erred in failing to charge the jury that the Logging Safety Code of the State of Oregon prohibited the deceased from going between the brow log and the log on his truck; and if they found that the deceased did so go, he was negligent as a matter of law.

(b) The Court further erred in failing to charge the jury if deceased was negligent as stated, and if the said negligence was the sole proximate cause of the accident no recovery could be had.

6. The Court further erred in failing to give defendant's Requested Instructions No. 1 through 9 which requested the Court to withdraw from the

consideration of the jury the certain specifications of negligence referred to therein and in particular the specifications of negligence with respect to any duty on the part of defendant to furnish the deceased with a safe place to work, as it appears conclusive from the evidence that the deceased in violation of the Oregon Logging Safety Code had placed himself in an unlawful place at the time of the accident and was then and there doing an unlawful act.

7. The Court erred in depriving the defendant of its theory of defense by failing to give defendant's Requested Instructions No. 15 and 17, in that it took away from the jury the matter of passing on the employment status of the deceased at the time of the accident.

8. The Court erred in failing to instruct the jury as requested with respect to a requirement that there must be an intermingling of employees in any event in this case before the Oregon Employers' Liability Act would apply.

/s/ JAMES ARTHUR POWERS,  
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR  
FILING REMITTITUR

Upon a motion of the plaintiff for reconsideration of the Court's opinion and decision made on December 5, 1950, in the above matter, and a motion for extension of time for filing the remittitur pending the disposition of the motion for reconsideration; and

It appearing to the Court that the said motion for reconsideration presents substantial questions of law affecting the decision of the Court on defendant's motion for new trial and plaintiff's motion for an order directing the entry of judgment; and

It appearing that there is insufficient time to hear and determine said questions prior to the time allowed for the filing of a remittitur by plaintiff,

It Is Hereby Ordered that the time allowed to plaintiff for filing a remittitur as set forth in the opinion of the Court on December 5, 1950, is extended until ten days after the hearing and decision of the Court on the plaintiff's Motion for Reconsideration of Opinion on Motion for New Trial.

Dated this 19th day of December, 1950.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed December 19, 1950.



[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is hereby given that Kathleen Hutchens, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered February 20, 1951, to the extent that it was based upon a remittitur.

/s/ E. U. SIMS,

Of Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 21, 1951.

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[Title of District Court and Cause.]

## STATEMENT OF POINTS UPON WHICH PLAINTIFF, CROSS-APPELLANT, WILL RELY ON APPEAL

Plaintiff, cross-appellant, Kathleen Hutchens, will rely on the following points on appeal:

### I.

The Court erred in failing to enter a judgment on the verdict in its entirety and in failing to grant plaintiff's motion for an order directing entry of judgment on the verdict in its entirety.

### II.

The Court erred in making the order denying the

motion for a new trial conditional upon the filing of a remittitur.

### III.

The Court erred in denying the motion for reconsideration of opinion on motion for a new trial, and in failing to reverse such an opinion, and in failing to direct entry of a judgment on the verdict.

### IV.

The Court erred in holding that the amount of the verdict was excessive and that such amount should be reduced, and in directing that unless a remittitur was filed a new trial would be granted.

### V.

The Court erred in making its order directing entry of judgment on the verdict as reduced.

/s/ WM. A. BABCOCK,

Of Attorneys for Plaintiff,  
Cross-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 24, 1951.

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[Title of District Court and Cause.]

PLAINTIFF, CROSS - APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the plaintiff, cross-appellant, Kathleen Hutchens, and hereby designates the follow-

ing portions of the record, proceedings and evidence to be contained in the record on appeal from the District Court of the United States for the District of Oregon, to the United States Court of Appeals for the Ninth Circuit, as follows:

1. The entire transcript of the pre-trial conference as shown by the reporter's transcript, except for those sections and pages specifically designated by the appellant under Item 7 in its designation of the contents of record on appeal.

2. The order extending the time for filing the remittitur.

3. Notice of appeal of the plaintiff, cross-appellant.

4. Plaintiff, cross-appellant's, bond.

5. Plaintiff, cross-appellant's, statement of points upon which plaintiff, cross-appellant, will rely on appeal.

6. Plaintiff, cross-appellant's designation of contents of record.

Dated at Portland Oregon, this 24th day of April, 1951.

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff, Cross-Appellant, Kathleen Hutchens.

Receipt of copy acknowledged.

[Endorsed]: Filed April 24, 1951.

In the District Court of the United States  
For the District of Oregon  
Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Defendant and Third-Party Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

TRANSCRIPT OF  
PRE-TRIAL CONFERENCES

May 16, 1950—9:30 o'Clock A.M.

Before: Honorable Gus J. Solomon,  
Judge.

Appearances:

WM. A. BABCOCK,

Of Attorneys for Plaintiff.

JAMES ARTHUR POWERS,

EARLE P. SKOW, and

FRANK E. NASH,

Of Attorneys for Defendant and Third-  
Party Plaintiff.

HUGH L. BIGGS,

Of Attorneys for Third-Party Defendant.

Mr. Babcock: I don't know. Perhaps it would be difficult. We have a third contention, which is one of law, and that is that in any event, even though he was an independent contractor, he is entitled to the protection of the Employers' Liability Act. That is more a contention of law than anything else.

Mr. Powers: You have a legal contention that no matter who he—even if he were an independent contractor that he would be entitled to the benefits of the Act?

Mr. Babcock: That's right.

Mr. Powers: As a member of the public.

Mr. Babcock: Not as a member of the public under the circumstances.

The Court: What is the name of your case on that?

Mr. Babcock: Well, there are a number of cases which——

The Court: I think Mr. Strayer just got through with that point over in this court. I believe he disagreed with your position.

Mr. Babcock: I appreciate that. I assume Mr. Nash and [25\*] Mr. Powers disagree, but in the language of the decisions of the Supreme Court, I think the position is well taken.

The Court: The reason I ask you about what case you were relying on is I have read a lot of those cases, and I just want to see what line you are using over there. There is a long series of cases—Clayton v. Enterprise Electric Company, Rorick v. North Pacific Lumber Company, Walters v. the

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Dock Commission, Coomer v. Supplement Investment Company, and McKay v. Pacific Building Materials Company. I am acquainted with all those cases.

Mr. Babcock: Then there are two cases in which the language of the Court is inconsistent with our position, but in which the decision was not necessary to the case. That is Saylor v. Enterprise Electric.

The Court: Who?

Mr. Babcock: Saylor v. Enterprise Electric. The language employed by the Court in that case might seem to exclude a person in the position of the decedent, here, but actually was not necessary to the decision of the case.

The language of these other cases——

Mr. Biggs: Have you cited Helzer v. Wax?

Mr. Babcock: Helzer v. Wax is another case which might appear to be somewhat inconsistent with our position.

Mr. Biggs: Is that the only one that actually did involve an independent contractor? [26]

Mr. Babcock: The only one I know of. The Saylor case did not. It involved somebody who was a trespasser, or, at best, a licensee, and in that case it was held that the party was not entitled to the benefit of protection of the Act but the language the Court used, that it might be confined to an employee, was language which was not necessary to the case. Broader language was used subsequently in other decisions. In the Coomer v. Supplement Investment Company and Drefths v. Holman Transfer Company, the latest two cases of



the group—the language was much broader in these. The plaintiff, here, assuming he was an independent contractor—that is the decedent——

The Court: Don't all those cases say you have to establish the relationship of employer-employee between——

Mr. Babcock: No.

The Court: ——as to somebody who is conducting the work?

Mr. Babcock: No, they don't say that. They say that in *Rorick v. North Pacific Lumber Company*. For example the Court used this language——

The Court: What were the facts?

Mr. Babcock: He was the captain of a steamship. He was not an employee in the ordinary sense of a person entitled an employee. He was a supervisor.

The Court: He was employed by the shipping company?

Mr. Babcock: But he was a supervisory or managerial employee, [27] and the Court said: "From a loose interpretation in that case and other cases mentioned, we deduce the rule that the Employers' Liability Act does not extend to the protection of the general public as such, but it does extend to an employee of the particular person owning or operating the dangerous machinery and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery or expose themselves to the hazard of the machinery or appliances in use by the owner thereof"; but it doesn't confine it to an employee.

Mr. Powers: Well, he was an employee in that case, anyway.

The Court: I think that the word "person" is used synonymously with "employee."

Mr. Biggs: They have directly so held in other cases you have cited.

(Argument, citing cases.)

The Court: Well, don't you think this might be the place to decide that question rather than go into court? Have you men heard about this contention of Mr. Babcock before this morning?

Mr. Powers: He never brought it up. I mean he has never made any legal statement on it.

Mr. Babcock: I certainly did.

Mr. Biggs: Yes, he did.

Mr. Babcock: I took that position in open court the first [28] day. I will ask Mr. Skow.

Mr. Powers: I wasn't here the first day, but in any event I am certainly not taken unawares. I am familiar with these cases, and embarrassingly familiar with the McKay case, which is my case.

The Court: I don't think the McKay case has anything to do with it.

Mr. Powers: I don't either. That was a question of whether there was any evidence to show that the two companies or one company belonged to the other. But I do think that the thing that has to do with it is the statement throughout the Employers' Liability Act, and, as Judge Fee stated, he was familiar with the Clayton rule, and so on.

(Discussion, citing cases.)

The Court: Is this the proper time to discuss this particular contention?

Mr. Powers: Well, it certainly would be helpful if it could be discussed and disposed of, and if that is what the Federal Rules of Civil Procedure try to do, try to reduce the issues instead of enlarging them, it might be very helpful.

Mr. Babcock: Well, your Honor, I have this thought: That at any rate we would want our position set forth in the pre-trial order, and we would want a ruling on that in such form that it would be clearly in the record, and we perhaps would wish to request an instruction on it. [29]

The Court: Well, I will tell you what I am going to do on that. I didn't realize we would be up against that contention. Can we go through the rest of the pre-trial order and reserve opinion on this one—put in his contention, and I will reserve ruling on it until prior to the time of the trial—and I hope a few days, at least, before I will make a ruling on that. As long as not all of you are prepared to answer or discuss some of the cases which Mr. Babcock has, I think we can use our time much more profitably on other portions of the pre-trial order. [30]

\* \* \*

Mr. Babcock: \* \* \* Secondly, the statement in there that the Industrial Commission has determined that decedent was acting at the time of the accident as an independent contractor is, in our opinion, entirely immaterial and not properly a part of this proceeding. It should not be in the

pre-trial order or should not be inadmissible in evidence.

Mr. Powers: That doesn't make it admissible, because it is in there. That will be determined at trial, I presume.

The Court: But the question is, may something be included in the pre-trial order that is absolutely inadmissible at the trial? Why would the determination by the Industrial Accident Commission have any bearing upon this proceeding?

Mr. Powers: Well, they have filed in here an election with the Industrial Accident Commission that is in the court records, and they are proceeding on that basis, so it has all the bearing in the world here.

The Court: You mean to say that if the State Industrial Accident Commission holds that Hutchens was an independent contractor that that is binding upon him in this proceeding or is any evidence? [49]

Mr. Powers: I think it would be binding unless he took an appeal from it.

Mr. Babcock: May I call your Honor's attention——

Mr. Powers: I think it would be binding unless there is an appeal. They have the right of appeal. Whether they have taken an appeal—we don't know what they do or propose to do.

Mr. Babcock: May I call your Honor's attention to the provisions and the language of the Code in 120-1729 where it is stated that in any third-party action brought pursuant to the provisions of this

Act the fact that the injured workman or his beneficiaries are entitled to or have proceeded shall not be pleaded or admitted. I think under the provisions of the Code it is clearly inadmissible.

Mr. Powers: This is in the nature of a supplemental pleading. You have stated what you contend, and it has been held that these determinations of the Accident Commission become binding on the Court if there is not an appeal taken from them. I am not so sure about Oregon, but I do know there are cases in Oregon.

The Court: Their act is considerably different from ours, isn't it?

Mr. Powers: It is different, but the administration of it is probably the same. It proceeds as an administrative body. In that respect it is similar, very similar. It certainly can't prejudice anybody to have it in there. [50]

The Court: Well, I don't think it should go in there. I think if you want to under your contentions of law that it might go in if it goes in any place.

Mr. Powers: How would we prove it? Suppose we want to make a showing, an offer of proof. The contentions of law I think should be determined from what your proof is, and there are a good many. As I started out, there are a good many things I don't think should be in here as far as the plaintiff's contentions are concerned, and I say since they put them in I have got to answer them, and I have answered them, and to let him say who was complying with the safety rule, and so on, and that



he was an employee—now, in face of the fact that it has actually been determined by the Accident Commission that he was an independent contractor—I don't see how I could just sit silently by.

The Court: Well, I——

Mr. Babcock: It was determined by the Commission he was an independent contractor in any event, but if he wanted to contend that, that is his contention, but I think it is immaterial.

Mr. Powers: I don't know what they did. They held he was not an employee and his only other possible status would be an independent contractor. Now, what do you contend?

Mr. Babcock: I don't contend, except that that fact is entirely immaterial to this proceeding. [51]

Mr. Powers: You were there and we weren't.

Mr. Babcock: If you want a copy of the Commission's order I should be glad to make it available to you.

Mr. Powers: Has it become final?

Mr. Babcock: Yes; it is under appeal.

Mr. Powers: You have taken an appeal?

Mr. Babcock: Yes.

The Court: What is the order?

Mr. Babcock: The order is that the claim of Kathleen Hutchens, widow, should be and the same is hereby rejected, and there is no evidence that said the deceased was employed subject to the provisions of the Oregon Workmen's Compensation Act at the time of said accidental injury causing his death.

Mr. Powers: And you, of course, will stipulate



that Francis was subject to the Workmen's Compensation Act at the time.

Mr. Babcock: That's right.

Mr. Powers: And you applied for compensation under the theory he was an employee of Francis?

Mr. Babcock: That's right.

Mr. Biggs: Isn't the official determination of an administrative body admissible in evidence, though not binding on the Court, where the claimant and his working situation is the very same matter before the administrative body as is before the Court? Isn't the administrative body's decision admissible in evidence for whatever [52] weight the Court may give it, and don't Courts incline to give considerable weight to such rulings? That is the general rule. I don't know why it wouldn't be admissible.

Mr. Babcock: That isn't my understanding of it, and, in addition, here, you have the actual provisions of the Code that that fact isn't to be brought into the case as far as the jury is concerned—at least whether he is or may be entitled to compensation under the State Act.

Mr. Powers: We would like to have it stay in if we can.

The Court: I think I am going to let it stay in despite the fact that I have grave doubts as to whether or not you may introduce any evidence on it, but I think the pre-trial order should contain all of the contentions of the parties. [53]

\* \* \*

Mr. Powers: Here is the point. We might not

be out of the lawsuit if this man is held to be an employee of Francis. Francis did all this. He did the loading. The deceased didn't have anything to do with those chains, and I don't know what they will have in the way of evidence about who told him not to go between the brow log. I know what we will have and what our understanding was with Francis, that no truck driver was to go between the brow log and the truck.

Mr. Biggs: You understand that if he did, he, himself, would be guilty of negligence in that regard.

Mr. Powers: Not necessarily so. I don't know what they will contend in that. When we let that contract with Francis, that was our understanding, that they would first bring the logs up into the water in boom sticks, and then that was revised and they were allowed to deliver them, and this service was—or they were permitted to use the crane and to pay for the engineer's wages, but it was their business to get the log in the water. Now, their contention is that he was on special employment for Johnson. We deny that. Their contention is that in any event he would be an employee of Francis. If he was an employee of Francis under our contract we have the right to show what we would expect would be done, and one thing was that the truck driver would not get between [57] that brow log and the truck.

Mr. Babcock: Well, we haven't charged you with any negligence on that.

Mr. Powers: Yes, I think you have. You claimed we violated the Safety Code rule in two or three

places, and you say up above that Francis was the one, and it was his loader that was bound to observe the Safety Code.

Mr. Babcock: We haven't charged you with negligence in permitting the driver to get between the truck and the brow log.

Mr. Biggs: You made that statement. Where do they charge you with such negligence?

Mr. Powers: Well, that is the only thing it can be. We admit he was killed when he was between the truck and the brow log. It is our contention he didn't have any business there. It is our contention under this contract no driver should get in there during the loading. Now, if they would admit that——

Mr. Biggs: Now, let's take that position.

Mr. Powers: Of course, this is between us and them.

Mr. Biggs: I understand that, except I can't understand why you keep attempting to charge Francis with something that they don't charge Francis with, and that doesn't advance your defense or support your defense.

Mr. Powers: I think it does.

Mr. Biggs: I don't care to argue it. I am not called on [58] to answer them, I assume.

Mr. Powers: I am making this against them. This isn't in any contention against you, but I am answering them, and you are coming into it now, and that is the reason I was asking you, but you noted undoubtedly up here in No. III that he contends that the employees were Francis' em-

ployees, and that the head loader—it was up to him to see whether the Safety Code rules were complied with. One of the safety rules is that the chain be so hooked on there that it can be unfastened from the opposite side of the brow log.

Mr. Biggs: I don't understand that he asserts that any place as negligence. As I understand the theory of his fact statement on that point it is to show that because of the control of Francis over the details of some of the logging operations there was probably an employer-employee relationship existing, but not otherwise, and anything in connection with the loading he was responsible for the loading and the unloading. Is that correct?

Mr. Babcock: That's correct.

Mr. Powers: If we can get a statement to that effect it will simplify this. They have made the contention that the deceased was on the opposite side of the truck to take off a binder chain at the time this accident occurred, and he was over there in the business of getting this unloaded. Now, if Mr. Babcock will say that is not the fact—— [59]

Mr. Babcock: No. I said we weren't charging any negligence on Francis in connection with the loading of the truck, and we aren't charging any negligence against C. D. Johnson in permitting him to go around in that position.

Mr. Biggs: Nor are you charging negligence against C. D. Johnson in connection with the manner that the truck was loaded.

Mr. Babcock: That's right.

Mr. Biggs: No charges of negligence were made against Francis or your client, C. D. Johnson, as to the manner in which the truck was loaded or the manner in which the truck was equipped. Is that correct, Mr. Babcock?

Mr. Powers: Let's put that in their contention. I'd like to have that in there.

Mr. Babcock: It is in there. We don't have to put in the things we don't contend.

Mr. Powers: What I would like to have you put in is your admission in court here.

The Court: It is in the record right there.

Mr. Biggs: It is right in the record.

Mr. Powers: And transcribe that for me if you will, please.

Now, another point. Is it not your contention that he had to be between two trucks and the brow log in order to unload his truck, and that that is what he was doing at the time of the accident? [60]

Mr. Babcock: That's correct.

Mr. Powers: Is it not part of the Safety Code rule that your binder chain shall be so put on that it is to be unfastened and released from the opposite side of the brow logs?

Mr. Babcock: Well, whether it is and whether that applies to the decedent in this particular situation is a question. I don't know. That would be a matter for you to contend, I assume.

Mr. Powers: Don't you see what you are saying up here is that the loader, the Francis loader, you say, it was up to him to select the log to be hauled, and he saw they were properly placed in accordance



with the Logging Safety Code and other applicable laws. Well, now, if that is the case your man had no business, and you are admitting it, on the other side of that truck, because it does require that binder chain to be on the opposite side of the brow log.

Mr. Biggs: Testimony has been taken already of Francis showing that the binder chain on a single log could be completely untied from the opposite side of the truck, and Mr. Babcock is not contending that the loader was in any way at fault in the manner in which it was tied.

Mr. Powers: But he is claiming, when he makes the other.

Mr. Babcock: I am not claiming one way or the other on that.

Mr. Powers: Let's go down here and see whether you make [61] that claim. I didn't bring in the Safety Code. ". . . in failing to enforce . . ."—maybe I am wrong— ". . . in failure to enforce proper rules and regulations in the safe operation of the dump and to conduct personally safety instruction of the employees engaged in the performance of work at the dump and in violations of the provisions of Section 1.12, 1.13, 1.14, 1.17 of the Logging Safety Code."

Mr. Babcock: No, I am reading from No. 2, the one we are reading from.

The Court: I see it in Subparagraph (4).

Mr. Babcock: Oh, page 7. I will have to take back my statement. I was mistaken.

Mr. Powers: We worked hard getting these in



some kind of shape, here, but that was the reason for it. And that would be the only reason you would put in there that the head loader was the one looking after that for Francis.

Mr. Babcock: But my statement remains that we aren't charging Francis with negligence.

Mr. Powers: But what you are trying to do is exonerate your own man from negligence.

Mr. Babcock: Naturally.

Mr. Powers: And that is the reason we want this in.

Mr. Biggs: What are these sections, and are they sections you are relying on?

Mr. Babcock: Yes. [62]

\* \* \*

The Court: What is your view as to whether or not the [65] violation of the Safety Code provision or any administrative ruling would be negligence or is evidence of negligence? Is there any dispute about that?

Mr. Babcock: It is our understanding and our position that it does constitute negligence per se.

The Court: Is that your contention also, Mr. Powers?

Mr. Powers: Our contention is that the jury should go by the facts here and not by this Safety Code. We didn't think that the Safety Code came into it until they brought it in. Now they brought it in and so we have answered them on the Safety Code.

The Court: In other words, you think the jury should have the information contained in the rules

of the Safety Code. You are pleading it yourself, and therefore——

Mr. Powers: I am simply pleading it in answer to them. I wouldn't have written it in at all unless they first brought it in. They opened it up, and I can, without prejudice to my position, answer it, and that is what brought it in.

Mr. Babcock: If he is going to contend that plaintiff violated some evidence of the contention I think he should make a definite position on it.

Mr. Powers: I made my position very clear. You claim there was a violation of the Safety Code. I don't think the Safety Code should be in it at all, but since you opened it up I have the right, I think, to reply to it without saying that [66] it should come in. If the Court should rule that you are right, that the jury shall be instructed as to what the Safety Code is, then I would want an instruction on mine. In other words, I have got to be prepared to meet whatever the ruling of the Court is on that. If the Court would want to rule on it now we could leave it out and it would be a wonderful thing. I would just as soon have the Court rule on it in advance. I would be very much pleased to have the Court rule whether the Safety Code will be given to the jury as some guide.

The Court: There is a recent decision upon the admissibility of safety codes, is there not?

Mr. Babcock: I am not familiar with it.

Mr. Biggs: Yes, I think there is, your Honor. I think that if a situation is one to which the logging or sawmill code promulgated by the Accident Com-

mission applies, violation of it is negligence per se.

Mr. Babcock: The last case I know is *Farley v. Consolidated Timber Company*, in which the Court held that the requirements of the Code were matters of public law, and, by implication, at least, although not in so many words, that they constituted negligence per se in the situation to which they applied.

Mr. Powers: Is that the case of *Bob Mautz and Glenn Jack*?

Mr. Biggs: No; *Bill Morrison* and——

The Court: Let's keep going. [67]

\* \* \*

The Court: Now, the issues of fact, is there any objection as to these?

Mr. Babcock: I might say on those, your Honor, in connection with the same question that came up under the contentions of [70] fact, perhaps we will want to revise the way I have them stated to make it clear that we aren't claiming joint employment, because they are misleading, I admit, at the present time.

Mr. Powers: You will clear that up in the contentions, too, won't you?

Mr. Babcock: At the same time as I clear it up in the contentions. [71]

\* \* \*

The Court: Let me ask one other question. Assume that the plaintiff does not recover against *C. D. Johnson Lumber Company*. Have you any-

thing in a separate trial to go against William R. Francis?

Mr. Babcock: Not in this case.

The Court: Not in this case?

Mr. Babcock: We have pending now a Workmen's Compensation claim, which has been initially rejected, and I wouldn't say—it is conceivable that at some future date it might be decided to sue Francis separately. I don't know. I hadn't thought about it.

The Court: Under the Employers' Liability Act?

Mr. Babcock: That's right; because he didn't cover these drivers under his contributions. He covered all the other employees, but he didn't make contributions to the state for drivers. [82]

The Court: What did that mean? If he should have paid contributions and didn't, he would be liable under the Compensation Act, but he wouldn't be liable under the Employers' Liability.

Mr. Babcock: What I had in mind, if the state rejects that claim, if its rejection is sustained on appeal either on the theory that he was an independent contractor or some other theory, then it is conceivable—I don't think likely, but it is conceivable—we might bring some cause of action against Francis.

The Court: C. D. Johnson would be out of the case anyway.

Mr. Babcock: I don't think there is much probability of that, but I don't want to make a statement.

Mr. Biggs: Do you see any purpose at all in my being held in this case?

Mr. Babcock: No. [83]

\* \* \*

Mr. Babcock: While we are waiting for Mr. Powers, I might say that I informed Mr. Powers and Mr. Nash last Friday that we were going to abandon the contention we had that decedent [84] was an employee of C. D. Johnson Lumber Company.

The Court: I didn't hear you. You are not going to——

Mr. Babcock: We are going to abandon that contention.

The Court: You are going to abandon?

Mr. Babcock: Yes. We are going to rely simply—he was an employee of Francis and worked at this place and was required to work with Johnson at that place.

The Court: In view of that fact, the probabilities are that Mr. Nash will no longer appear in the case.

Mr. Babcock: He said that he thought he would file a motion for a withdrawal or a form of withdrawal of some kind, and that he didn't think that he would be here in the morning. [85]

\* \* \*

Mr. Powers: Now, you are changing your contentions, as I understand it, very materially from what they were. See if I am correct, now—eliminating from the pre-trial order any claim that the deceased was an employee of C. D. Johnson Lumber Company, either in any special employment, general employment, or employment of any kind of the de-

fendant C. D. Johnson Lumber Corporation. Now, is that clear?

Mr. Babcock: That's correct. [110]

\* \* \*

### Certificate

I, Catherine Mulvey, Official Reporter of Department No. 8 of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I have transcribed into typewriting from the notes of Glenn G. Foster, an official reporter of the above-entitled Court, now deceased, the proceedings had upon pre-trial conferences in the above-entitled cause on May 16 and 22, 1951, and that the foregoing and hereto attached 115 pages of typewritten matter, numbered 1 to 115, both inclusive, constitute a full, true, and accurate transcript of the notes of the said Glenn G. Foster, deceased.

Dated at Portland, Oregon, this 17th day of March, 1951.

/s/ CATHERINE MULVEY,  
Court Reporter.

[Endorsed]: Filed April 5, 1951.



[Title of District Court and Cause.]

Portland, Oregon

June 20, 1950, 10:45 o'Clock A.M.

Before: Honorable Gus J. Solomon,  
Judge.

Appearances:

WILLIAM A. BABCOCK, and  
EMERSON U. SIMS,  
Of Attorneys for Plaintiff.

JAMES ARTHUR POWERS,  
Of Attorneys for Defendant.

### TRANSCRIPT OF EVIDENCE

(A jury was duly and regularly empaneled and sworn, opening statements were made by counsel in behalf of the respective parties, and thereafter an adjournment was taken until 2:00 o'clock p.m., of this day, Tuesday, June 20, 1950, at which time the following further proceedings were had herein:)

The Court: You may proceed.

Mr. Sims: Mr. Vincent.

CLYDE C. VINCENT

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

(Testimony of Clyde C. Vincent.)

Direct Examination

By Mr. Sims:

Q. You are Mr. Clyde Vincent and the Mr. Vincent I was talking about to the jury here this morning? A. How is that?

Q. You are Mr. Clyde Vincent? A. Yes.

Q. Do you have trouble hearing me?

A. I did at first.

Q. I will try to keep my voice up a little bit. I said you are the Mr. Vincent that we have referred to this morning in talking about the foreman—— A. Yes, sir. [2\*]

Q. ——at C. D. Johnson Company. About how old are you now, Mr. Vincent?

A. I will be fifty-seven in September.

Q. And you live over at the coast, Toledo?

A. Yes, sir.

Q. And I believe you work for the defendant Johnson Lumber Company, and have for quite a while. Is that right? A. About eight years.

Q. About eight years. And you are still working there now, aren't you? A. Yes, sir.

Q. And in a general way what were your duties—what was your job—last August, 1949, when Dean Hutchens was——

A. Well, sir, I am in charge of the boom crew there in regards to telling the men what time of day to come to work and planning the work to be done, how we are going to take care of the logs, and so on.

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\* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Clyde C. Vincent.)

Q. Would it be an accurate statement for me to suggest that your work is on the water, having to do with the boys that are working on the water?

A. Yes, sir.

Q. Were you on the job the day of the Hutchens accident?

A. Yes, sir.

Q. And did you happen to be on the water that day, or did you happen to be on the dock? [3]

A. I was on the dock.

Mr. Sims: I wonder if we might have the photographs.

Q. We are handing you a group of photographs, Mr. Vincent, through the courtesy of the bailiff, and I am wondering if you can identify those pictures. You can look at them quickly and tell us if you can identify the pictures, know what they are.

A. I would say that is Mr. Dean Hutchens.

Q. All right. Then the next picture.

The Court: Will you please identify them?

Q. (By Mr. Sims): On the back is a number.

A. That is Exhibit—Case No. 5087, Exhibit No. 2. This is a picture of the log dump with a load at the brow log and line tightened up.

Mr. Sims: I wonder, your Honor, if, for convenience's sake, I might continue with the witness and then later offer them in evidence as one exhibit—counsel has already seen them—and then show them to the jury instead of taking them one at a time.

The Court: That is Plaintiff's 3, isn't it?

A. Exhibit 3.

(Testimony of Clyde C. Vincent.)

Q. (By Mr. Sims): All right. Then the next one. You go right ahead, Mr. Vincent, and take the pictures.

A. Well, that seems to be about the same picture of the donkey, perhaps of a different load—Exhibit No. 4. That is [4] taken at a different angle. Not the same load, I don't believe.

Mr. Powers: We would have no objection—we have already waived identification—to having counsel state what they are. He can state what they are.

Mr. Sims: Then I will offer them in evidence and show them to the jury.

Mr. Powers: Well, I think you ought to state what they are.

Mr. Sims: If I may stand by the witness we can look at them together.

The Court: I don't think it is necessary for the witness to look at them. You can just tell what they are.

Will you give them back to Mr. Sims?

Mr. Sims: As I understand it, these are now in evidence—I am offering them in evidence.

The Court: What are you offering in evidence?

Mr. Sims: I am offering Pre-trial Exhibit No. 2 in evidence, and, as I understand it, there is no objection.

The Court: 2 and what else? You have a number of photographs. If you will just list the ones you are offering.

Mr. Sims: 2 to 14, inclusive.

The Court: Any objection?

(Testimony of Clyde C. Vincent.)

Mr. Powers: No. They are offered, I might say, as having been taken at other times and merely as illustrative of the general conditions there, and not to prove any specific fact in this case? [5]

Mr. Sims: I wouldn't want to be limited in that, because, they do prove some specific fact. They show this specific brow log and a photograph of this particular plaintiff. They are not just to be scrubbed off quite that way.

Mr. Powers: Well, at the pre-trial we had on this that is the purpose of them—that is, they were illustrative. As far as the one of the plaintiff is concerned, that, of course, would be his picture. We don't mind that, but this doesn't show the condition as of the time of the accident. I mean these were taken at another time, so all they can do is to illustrate the general circumstances which we want them to go into, but they were not taken on the day of the accident.

Mr. Sims: That is what I am saying.

Mr. Powers: So they will be illustrative as to the general condition, and no objection.

The Court: Exhibits 2 to 14 are admitted.

(The photographs, so offered and received, having been previously marked Plaintiff's Pre-trial Exhibits 2 to 14, inclusive, were thereupon admitted in evidence as Plaintiff's Exhibits 2 to 14, inclusive.)

Mr. Sims: The first photograph that I am hand-

(Testimony of Clyde C. Vincent.)

ing you is No. 2, and that is a photograph of the plaintiff.

No. 3 is a picture, as suggested by the Witness Vincent, showing the dock, two loads of logs, the crane with [6] a sling line under the load tightened.

And No. 4 is a photograph with much the same view, again showing the crane, the dock upon which the crane rests. It does not show, however, the same level that the trucks were required to use. It does show the load and the sling line under the load with the sling line tightened. I am handing this No. 4 to Mr. Powers, and from him to the bailiff, to the jury.

And No. 5 is much the same as No. 4, except a different view. I am handing that to counsel and then to the bailiff.

No. 6 presents the same problem except and with this difference: that this shows the crane at a time when it is at the end of the dock that it travels upon and shows a different view, but it principally shows the level upon which the trucks operate. It shows two loads. It shows a crane with the sling line tightened, and it is taken, as I have suggested, at the end of the dock where the unloading crane travels. That was No. 6, I believe.

No. 7 is——

Mr. Powers: That last one is looking south. I will add that. Is that right?

Mr. Sims: I think that's right, yes. Thank you, Mr. Powers.

The next picture is No. 7, and it shows the same



(Testimony of Clyde C. Vincent.)

operation, but is taken from the level that the crane is [7] traveling.

No. 8 is simply a picture of a truck with a one-log load.

No. 9——

Mr. Powers: What is that, please?

Mr. Sims: That is a picture of a one-log load.

Mr. Powers: No particular truck?

Mr. Sims: No.

No. 9 is a close-up of the trailer end of a load and shows the channel that the cheese block, or whatever we might call it—how do we refer to these?

Mr. Powers: They are called bunk blocks.

Mr. Sims: Well, a cheese block is a bunk block, and it shows the chain that is tightened.

No. 10 is the same as the former picture except it shows the arrangement by which the chain binder is tightened, that tightens the chain that goes around the load.

No. 11 is a close-up that was taken of the channel and the cheese block. It shows the chain that is attached to it. That is No. 11.

No. 12 is a picture showing a chain tied to it, I believe to the trailer. I am not sure. Is that the trailer or the truck? Tied to the truck.

No. 13 is a picture of the dock, itself, without any truck or log on the dock. It is the dock that is involved, [8] and shows three brow logs. It shows the railroad track, and it shows the level of the dock as used by the trucks. It shows somewhat the

(Testimony of Clyde C. Vincent.)

level upon which the unloading crane rests. There are some 4 by 8's, or something of the kind, in the foreground that have nothing whatsoever to do with this particular trial. That is No. 13, I believe.

No. 14 is another picture which was taken from a slightly different angle and discloses the foreground of this operation and the end of the brow log that is involved, shows the unloading crane and the two levels.

Mr. Powers: And looking north?

Mr. Sims: Looking north.

Thank you, Mr. Powers.

The Court: All right, Mr. Sims. I think they are through. You may proceed.

Mr. Sims: May I?

The Court: Yes.

Mr. Sims: Thank you.

Q. Mr. Vincent, on this particular day in question, whereabouts were you there at this landing?

A. I was about eight feet to the right and perhaps ten feet to the front of the truck.

Q. Now, then, could you take these pictures again and indicate from one of the pictures, identifying it by the number that appears on the back, which picture you feel discloses your [9] location? I would suggest, Mr. Vincent, that it might be that No. 14 will help you.

A. Yes, that is a very clear picture.

Q. You remember when I was there?

A. Yes, sir.

Q. And you helped me, I think. What picture,

(Testimony of Clyde C. Vincent.)

Mr. Vincent, are you referring to?           A. No. 14.

Q. And No. 14 shows where you were standing, you say?

A. Well, at the time Mr. Neal asked me for the signal I was sitting on this pile of lumber, or a similar pile, and I got up to see if this boom man was clear.

Q. All right. Now, what did you do to determine if he was clear?

A. I got up and walked over in front of the truck in the middle of this railroad track, practically, and I could see his head down on the boom.

Q. Yes.

A. (Continuing): And I signaled Mr. Neal that he was in the clear.

Q. And——

Mr. Powers: Who was in the clear?

Q. (By Mr. Sims): Well, you mean the man that was on the water?           A. Yes, sir.

Q. Yes. I understood you. And, in other words, there was no [10] person that would be involved in any way or affected in any way by the unloading. That is what you meant, wasn't it?

Mr. Powers: Just a moment. If the witness please, if you don't hear the question, give us a chance to interpose. Now, I would like to have counsel ask him directly what he means. Now, if he means Dean Hutchens, he ought to make it clear to the witness. Is that whom you mean?

Mr. Sims: No, of course not.

(Testimony of Clyde C. Vincent.)

Q. Mr. Dean Hutchens was not a boom man, was he?

Mr. Powers: No, no one contends he was a boom man. A. No.

Q. (By Mr. Sims): Now, you said the boom men were clear. Is that right? And that is what you meant? A. Yes, sir.

Q. And then what was the next thing that happened? Did you then give a signal to Mr. Neal?

A. As I saw the boom man I gave the signal, yes, sir.

Q. And at that time you were standing in front of the truck? A. Yes, sir.

Q. Was it your duty at that time, or has it ever been your duty, to see to it that all men are in the clear both on the water and on the dock at the time of an unloading? A. No, sir.

Q. Is there such a man?

A. No, sir. [11]

Q. Is there such an employee?

A. The only one is the man that is operating the crane. In his judgment everyone is supposed to be in the clear when he dumps the load.

Q. Now, then, would you turn to one of the pictures that you feel discloses best where the unloading engineer is? Which one of those pictures do you think shows that the best? I think 12 or 13, perhaps.

A. Well, I can't see where he is sitting, but it is in front of this donkey facing the log.

Q. All right. Now, what picture is that, please?

(Testimony of Clyde C. Vincent.)

A. No. 7.

Q. No. 7. Thank you. And that is taken in what direction?

A. Well, it was taken from a different brow log, but it was taken from the southerly direction.

Q. That would be, then, faced towards the direction that the trucks approached from?

A. Yes, sir.

Q. The dock runs north and south?

A. Yes, sir.

Q. That's right, yes. Now, what then happened as soon as you signaled that the boom men were then in the clear? What then happened?

A. I believe he proceeded to dump the log immediately.

Q. And who was it that would determine which brow log would be [12] used? Is that the job of the boom foreman or the unloading engineer?

A. That is my job.

Q. That would be part of your job?

A. Yes, sir.

Q. And the unloading engineer—describe that crane, please, a little bit to us. Is it a movable thing?

A. You understand we don't have water to float logs at all times of the day. Therefore we have three brow logs, and when they are not loading we pile them up until we get one piled up as many as we can get in there, and then we move to the other and proceed to the same thing, and when the water comes in they are broken down and floated away.

(Testimony of Clyde C. Vincent.)

Q. About how wide is the dock that the truck drivers have to drive on?

A. Oh, eleven or twelve feet.

Q. And ordinarily—I realize that with the coming in and out of the tides it makes a lot of difference, but about how high is this level of the dock from the water?

A. At low water I'd say fifteen feet.

Q. And at high water it is what? How much less?

A. Oh, six or eight feet, depending on the size of the tide.

Q. Whether it is a high tide or not. Yes. Then this unloading crane is on a dock. We observe that is a little higher than the dock the boys drive on with the trucks. About how much [13] higher is it?

A. Approximately three feet.

Q. About three or four feet, would you say?

A. Between three and four feet; yes, sir.

Q. And then the seat of the chain, itself, is up above the level of the dock that the crane is on how much?

A. About six feet.

Q. How is this unloading crane moved?

A. Well, it is a converted steam shovel, and it travels on tracks that is driven by gears from the main engine.

Q. Would it be a fair statement for me to say it is the wide caterpillar-type of traction?

A. Yes, sir.

Q. And is it moved up and down then to accom-



(Testimony of Clyde C. Vincent.)

moderate the particular brow log you are going to use?      A. Yes.

Q. Is that right?      A. Yes.

Q. Who was the unloading engineer there that day, if any?      A. How is that?

Q. Who was the unloading engineer?

A. Mr. Fred Neal.

Q. That was Mr. Neal. And he has been there about how many years, if you know?

A. Well, he was there before I was, and I came on that particular [14] job six years ago, and I believe and I think he was there perhaps two or three years before I was.

Q. You have already testified by whom you are employed, but by whom is Mr. Neal employed?

A. The same party.

Q. The C. D. Johnson Lumber Company?

A. Yes, sir.

Q. And whose dock is this?

A. C. D. Johnson Lumber Company.

Q. And whose unloading crane?

A. C. D. Johnson's.

Mr. Powers: That is all admitted.

Mr. Sims: Descriptive.

Mr. Powers: I don't see how. It is all admitted, and no need of taking time on it.

Mr. Sims: All right.

Q. And how is the log, or are the logs, the load, unloaded? How is that done? Will you take that

(Testimony of Clyde C. Vincent.)

step by step and tell us—after the truck comes in there with a load of logs?

A. Well, as the driver drives in to the brow log the man on the donkey swings the block and the lines along with the load something along near the center of the load. When he gets to the proper position to unload that log he is given a whistle signal to stop. If he happens to go too far ahead he is whistled to back up. Then the driver proceeds to get out of his truck, [15] take this line, this unloading line, which is laying on the line which he drives over, puts it over the reach, and puts it onto the block, and that is immediately tightened up, and then he proceeds to take off his chains unless he unfastens the hooks that fastens his bunk chains or bunk blocks, and then he is supposed to be ready to dump his load, and the procedure from then is for that truck driver to see that the boys are clear on the water, and if there is two there you will see one man usually knock one chain, one rear end chain, and the other man will knock the front end chain. That is when they are quite busy, you know, and each truck driver is trying to help the other fellow along to save time. At that time there is a signal man at each end, as a rule, and gives us a double check.

Q. And that is a practicable—

A. (Continuing): And if a man is alone it saves him from walking from the back end to the front end.

Q. May I ask this, Mr. Vincent: From your ex-

(Testimony of Clyde C. Vincent.)

perience is that a practical sort of an arrangement for there to be two men to work together?

Mr. Powers: That is a question for the jury, a question of law.

Mr. Sims: Practicability? We charge it was practical for them to have the extra man there. The evidence will show, of course, that at this time there was no other truck driver there. [16] I believe it will.

The Court: You are claiming that this man, Mr. Vincent, is an expert?

Mr. Sims: Yes, your Honor; he is. He has worked, he said, eight years, and was a foreman there in charge of this particular operation.

The Court: What did you do prior to the time you were a boom foreman for C. D. Johnson Lumber Company?

A. I worked for the Linn County Logging Company.

The Court: Were you a boom foreman then?

A. No, sir.

The Court: How long have you been in the industry?

A. I worked for Mr. Carey, I guess, ten or twelve years before I came there, building deep sea rafts.

The Court: Building deep sea rafts?

A. Yes, sir.

The Court: How long have you been in the logging and sawmill business?

A. About twenty years.

(Testimony of Clyde C. Vincent.)

The Court: Twenty years.

I am going to let him answer the question and give you an exception.

Q. (By Mr. Sims): Do you know what my question is, Mr. Vincent?

The Witness: Repeat it.

(Last question read.) [17]

A. As to safety—well, there is a question there in my mind. At times we have four or five around there, and it is pretty hard to look after them all, don't you see.

Q. That's right.

A. (Continuing): And therefore the man on the donkey has that extra man around there that he has to watch, and the more there is around there the more you have got to watch. I also operate the unloading rig, you understand.

Q. You have operated the crane that is in use—in fact, the very crane we have the picture of, haven't you?

A. Yes, sir.

Q. All right. And, seated, as the crane operator is, or as you are when you are the crane operator, does it become your duty as a part of the operation of the crane to see that the men are in the clear before you unload?

A. Yes, sir.

Q. You mentioned that there is a whistle signal. From your experience in this field, Mr. Vincent, would it be a practical, safe sort of an arrangement for there to be a whistle signal as the sling line is tightened and the unloading takes place to give a

(Testimony of Clyde C. Vincent.)

further warning to everybody within the sound of the whistle and in that area that there is an unloading taking place?

Mr. Powers: We object.

Q. (By Mr. Sims): Could that be done? Could there be a whistle? [18]

A. It could be done, but I don't see it would make it any safer.

The Court: Just a minute.

Mr. Powers: I will withdraw the objection. The witness stated he didn't see it would be any safer to have a whistle.

Q. (By Mr. Sims): Could there be such a whistle?

Mr. Powers: I will object to that. The question is a safety measure.

The Court: I will sustain that objection.

Q. (By Mr. Sims): About how much higher—I may have asked you this—is the level upon which the crane moves than the level upon which the trucks drive? I asked you from the height of the water up, and that varies, you said, according to the tide?

A. Yes, sir.

Q. And I asked you the elevation that the crane operator was above you, but I am not sure that I asked you this other question. Would you give us the benefit of that, the difference in the level of the floor the trucks are on and the floor that the crane is on?

A. I stated between three and four feet, I think.

Q. Thank you. I wanted to be sure that was cor-

(Testimony of Clyde C. Vincent.)

rect. Now, on this particular occasion, about what time of day was it that Dean Hutchens drove in there?

A. To the best of my knowledge, around 9:00 or 9:30.

Q. And what kind of a load did he have? [19]

A. A one-log load.

Q. And did you observe whether the truck was spotted by Mr. Neal, or did you do that?

A. Mr. Neal did that.

Q. And then what is the next thing that Dean Hutchens did?

A. Well, I can't recall. I don't recall that I ever saw him even get out of the truck, as far as that goes.

Q. When is the first time that you saw him?

A. Oh, I suppose two or three weeks before the accident.

Q. I mean on this particular day.

A. Oh, I suppose I saw him get out of the truck, but as to his actions that he went through there I can't remember. It is a routine. That happens two hundred times a day. How could you expect a man to remember all those actions?

Q. That's right. Well, when is the first distinct recollection you have of Dean Hutchens on that particular occasion? Was it after the unloading?

A. After the unloading; yes, sir.

Q. And where was he at that time?

A. He was laying to the side of the rear end of the trailer.



(Testimony of Clyde C. Vincent.)

Q. And where was that with relation to the brow log?

A. At the north end of the brow log.

Q. And what was the situation then at that time?

A. Well, he appeared to be crushed.

Q. And did you make any examination of the trailer to determine [20] whether the chain was or was not removed?

A. Well, we all looked at it there. There was three of us, and everything was ready to dump the load, as far as we could see.

Q. As I understand it, you don't know whether there was a chain on or not when he was spotted there at the brow log. You don't know whether those chains had been removed before or after he stopped?

A. No, sir; I don't know whether there was a chain on there when he come there or not.

Q. What other man or men were there around there at that particular time?

A. Well, the donkey operator, myself, and Mr. Spoor was all that happened to be there at that particular time.

Q. And was Mr. Spoor employed by C. D. Johnson Lumber Company, or was he another truck driver?

A. Mr. Spoor was employed by the C. D. Johnson on the boom.

Q. Well, he was on the water?

A. He was on the water at that time.

Q. Were there any other trucks ahead of the

(Testimony of Clyde C. Vincent.)

Hutchens truck, or closely behind it, as you recall?

A. Well, we had perhaps dumped a load of logs just ahead of that. I don't remember how long ahead of that.

Q. There is one thing that we haven't covered at all, any of us, and that is this business after the trucks were unloaded. How [21] did they get off of this dock?

A. Well, there is a kind of a circle they go around and come back onto the tramway again.

Q. And is that fact disclosed by one of these pictures, this turnaround?

A. I don't believe—well, you can see a part of it here, yes, on this picture, here (indicating).

Q. And that is picture No. what?

A. Well, it is 6, I suppose—8 has been marked out on this particular—it is No. 6.

Q. No. 6 shows the turnaround?

A. Well, it shows where it comes back onto the tramway, here.

Q. To the best of your recollection, Mr. Vincent, was there any other truck driver around near there at this time?

A. No, sir.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Mr. Vincent, just a question or two. After the accident occurred and you went back—that is when you knew the deceased had been crushed—now the

(Testimony of Clyde C. Vincent.)

log, itself, what had become of it? Had it gone down into the Yaquina River into the Bay?

A. Yes, sir.

Q. It had gone over the brow into the water?

A. Yes, sir. [22]

Q. Now, at Yaquina Bay or River, you mentioned a tidal flow, there. It is affected by the tide from the ocean, isn't it? A. Yes, sir.

Q. And it is tidal water in there?

A. Yes, sir.

Q. The water, itself, as I understand it, is a public stream, navigable stream?

A. Yes, sir.

Q. And not the property of C. D. Johnson Lumber Company?

A. Supposed to belong to the Government, I believe.

Q. Now, when you get the logs in the water, what is done with them? Are they put up in rafts, in booms? A. Boom sticks.

Q. They are put up in boom sticks and hauled away, there, are they? A. Yes, sir.

Q. Then in determining whose log that is, who brought the log in, that, then, is the job of the scaler. Is that right? A. The log is branded.

Q. The log is branded when it comes in, but you say it is put into boom sticks? A. Yes, sir.

Q. Then somebody has got to determine who brought that log in? A. Yes, sir.

Q. And that would be Mr. Calavan, would it? Isn't he the scaler? [23] A. That's right.

(Testimony of Clyde C. Vincent.)

Q. So the logs of Francis, or the logs the deceased, Dean Hutchens, was hauling, they would have the brand on them? A. Yes, sir.

Q. And you could tell they brought the logs in from that brand? A. Yes, sir.

Q. Well, Mr. Vincent, in giving the signal you mentioned—the engineer, there, is the one that lifts the log. Now, who gives the signal to the engineer that the unloading operation is in the clear and go ahead with it? A. The truck driver.

Q. That is up to the truck driver, isn't it?

A. Yes, sir.

Q. And I think it is your testimony that one truck driver could give that signal as well as two?

A. Well, certainly.

Q. And it might be a little safer not to have two around so that you would have two to look for. Is that right? A. That is my contention.

Q. Now, whose work is it to get that load ready for lifting and dumping into the water?

A. The truck driver.

Q. Is there any employee of the C. D. Johnson Lumber Company that attempts to go down and get that load ready, or is that done entirely by the truck driver? [24]

A. Done entirely by the truck driver.

Q. And that equipment on the truck, the bunk blocks and the binder chains, that is all part of the truck equipment, isn't it? A. Yes, sir.

Q. And the only equipment that C. D. Johnson has there at all is the sling line that he gets around

(Testimony of Clyde C. Vincent.)

his load and attaches onto the line from the crane, outside of the brow log?      A. And the donkey.

Q. And the donkey. But I mean of any moving equipment around there. All this other part is the truck and the chains and bunk blocks, and they all belong to the truck?      A. Yes, sir.

Q. Now, then, after the log is unloaded, what does the truck driver do with respect to getting his trailer back upon his truck there so he can haul it away?

A. He puts his bunk blocks back in the channel and fastens his chains so that they don't tangle around, and proceeds to hook the hook onto the loading block, onto the trailer, and pick up the—the donkey engineer picks up the trailer and sets it on the back of his truck.

Q. But in that work in handling the truck, in making the truck ready for unloading, that is done by the truck driver; he fastens all the wires and cables, and so on?      A. Yes, sir.

Q. And looks after the equipment? [25]

A. Yes, sir.

Q. And it is the truck driver that gives the signal to go ahead and unload?      A. Yes, sir.

Q. Now, you never give that signal to unload, do you?      A. No, sir.

Q. And this signal that you were talking about giving, what did that signal relate to—when the boom man was in the clear?      A. Yes, sir.

Q. That is all that related to, isn't it?

A. Yes, sir.

(Testimony of Clyde C. Vincent.)

Q. Now, it was stated here this morning by Mr. Sims that you should have checked up on the driver to see where he was.

Mr. Sims: Now, just a minute. If the Court please, I think we ought to confine ourselves somewhat to the facts. I did not make that statement, to my recollection. I said that if it had been the duty——

The Court: It doesn't make any difference at all.

Mr. Sims: It is cross-examination.

The Court: His statement is not evidence.

Why don't you ask him the question?

Mr. Powers: Well, since he hasn't developed it in his case, I won't go into it, if that is the case, if he isn't going to intend to prove what I thought he said he was.

The Court: The jury is to disregard the gratuitous remarks [26] of counsel.

You are through with this witness?

Mr. Powers: I wanted to ask one other question.

The Court: All right.

Q (By Mr. Powers): Mr. Vincent, after the accident was over, as I understand your testimony, the three of you that examined the truck there found that the truck was all ready to be unloaded?

A. Yes, sir.

Q. There were no broken chains or anything like that, were there? A. No, sir.

Q. Now, was there, in fact, any binder chain around there anywhere that you saw?

A. Not at the rear end of the truck.



(Testimony of Clyde C. Vincent.)

Q. Well, did you see a binder chain anywhere? Did you look around?

A. I don't recall whether I looked in what they call the jockey box or not, but I do remember Mr. Calavan coming immediately after and saying, "Well, no loose chains or anything around."

Q. You can't say that; just what you saw. You didn't see a loose binder chain around the area of the truck?

A. No, sir.

Q. Now, can you explain to the jury, if you please, the difference between what counsel has referred to as a binder chain [27] and a bunk chain—and I have in mind particularly the length of a binder chain. Can you tell the jury what a binder chain does?

A. Well, sir, a binder chain is about 16 foot long, on the average, and it is made of somewhat lighter material than the bunk chains. The bunk chain is perhaps 8 feet long and goes immediately through the end of the bunk, a hole approximately that large (indicating). It is fastened on one end to the cheese block, or the bunk block, and on the other end it has a hook that you can regulate the length by when we want to tighten up the load.

Q. Now, is a bunk chain ordinarily fixed so that you can release it from either side?

A. You can release the brow log side from the opposite side——

Q. Yes.           A. ——of the brow log.

Q. And that is all that is required. As I understood your testimony, you are not exactly certain whether you saw the deceased get out of the cab.

(Testimony of Clyde C. Vincent.)

You may or may not have seen him, but you did not see him again until after the accident occurred. Is that right?      A. Not to my knowledge.

Q. You never saw him at any time, did you, between the load, this log load and the brow log?

A. No, sir. [28]

Mr. Powers: That is all.

### Redirect Examination

By Mr. Sims:

Q. Just a minute. You say that the binder chain would be perhaps 16 feet long. About what would be the value of that chain?

A. Well, sir, I don't know.

Q. And do you have any idea what the value of the bunk chain would be?      A. No, I do not.

Q. Now, getting back to this matter of a signal, would it be a practicable thing to have one man whose sole duty was to see that the truck driver was in the clear, or truck drivers were in the clear, and also that the men on the water would be in the clear so that there would only be one man giving the signal instead of one man looking at the water and somebody else doing something with reference to the water?

The Witness: Would you repeat that again?

Mr. Powers: Now, let me just say that Mr. Vincent has testified that it is up to the truck driver to look in the water, and after looking in the water to give the signal, and he testified to that, your Honor.

Mr. Sims: Well, counsel knows it is a non-

(Testimony of Clyde C. Vincent.)

delegable duty on the part of the employer, and I think it is a part of our case and my duty to this jury to develop whether it is a [29] practicable thing to have a safety man on the dock so there will be only one signal. It is true that what they are doing is letting the truck drivers do some signaling. I am asking if it wouldn't be a practicable thing to have a man whose sole duty would be to see that everybody was in the clear.

The Court: Objection overruled. You may answer the question, Mr. Vincent.

A. Well, as I have said before——

Q. (By Mr. Sims): Well, you answer "Yes" or "No," and then give your explanation.

A. No.

Q. You don't think it would be practical?

A. It can be practical, yes, but from a safety standpoint I can't see as it would improve things.

Q. If you had not been the boom foreman, if you had been such a safety man, would this accident have occurred?

A. Well, any man is subject to a mistake. That particular accident might not have happened; some other might happen.

Q. But this particular accident——

Mr. Powers: We will object to that, your Honor.

The Court: I think he is going too far. I will sustain the objection.

Mr. Powers: I move that that question and answer be stricken. It is not proper.

The Court: Well, you didn't object to it. [30]

(Testimony of Clyde C. Vincent.)

Mr. Powers: How did I know what he was going to say? I am objecting to it now and move it be stricken. It invades the province of the jury and is not a proper question, what might have occurred. It is the highest form of speculation you can call for.

Mr. Sims: As I understand it, your Honor, he was facing this truck so that his view was straight down the brow log, and that is the reason I felt that was a proper question.

Q. It would have been, in other words, a safe practice to have one man to do all of the signaling for the unloading?

Mr. Powers: I move that it be stricken.

The Court: I am going to strike the answer, and the jury is instructed to disregard it.

Q. (By Mr. Sims): From your view there in front of this truck, had your attention been called down the length of the brow log, were you in a position where you might have seen Dean Hutchens?

A. No, sir; I was not.

Q. You were over too far. Is that it?

A. I was practically in the center of the truck, there, in the cab, and it would have prevented me from seeing it.

Q. I believe you said it was the duty of the unloading engineer to see that the men were in the clear?

A. That's right.

Mr. Sims: That is all. [31]

(Testimony of Clyde C. Vincent.)

Recross-Examination

By Mr. Powers:

Q. Well, now, you are familiar with the Logging Safety Code that prohibits a driver from going between the load and the brow log, are you not?

A. Yes, sir.

Q. It is against the law for anybody to be in there where he thinks you ought to have seen him. Is that not correct?

Mr. Sims: Just a minute. If the Court please, it is not up to a witness to pass upon what the law is and advise the jury as to the law.

The Court: No, I don't think——

Mr. Powers: What I was getting at, your Honor, is that if there is somebody else there that he should have been looking between the brow log and the log. Now, I submit to your Honor that it is important, then, for the jury to know at this point whether anyone would expect any driver to be between the log load and the brow log, because of that safety provision.

The Court: Just one second.

Mr. Powers: Yes.

The Court: That is not the question and not the question that was objected to, and the objection will be sustained. The objection goes to the question you are asking this witness, whether it wasn't against the law for a person to be between the brow log and the truck. [32]

Mr. Powers: Yes; I was asking him if he were

(Testimony of Clyde C. Vincent.)

familiar with that, the same as I would ask someone if he were familiar with the red light, whether he should go across the street or whether he should look for someone. That is the only point.

The Court: The jury is instructed to disregard the statements of counsel.

Q. (By Mr. Powers): Well, I will put it this way——

Mr. Powers: Well, that is all, Mr. Vincent.

Mr. Sims: That is all. Thank you, Mr. Vincent.

(Witness excused.) [33]

Mr. Sims: Mr. Neal.

### FREDERICK MILES NEAL

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Neal, to introduce you a little more, as I understand it, you are the unloading engineer——

A. Yes, sir.

Q. ——that we have been referring to. Is that right?

A. That's right.

Q. And about how old are you, now, Mr. Neal?

A. How is that?

Q. About how old are you now?

A. I am seventy-two.

The Court: Mr. Sims, will you speak up?



(Testimony of Frederick Miles Neal.)

Mr. Sims: Yes, I will.

The Court: I'll tell you, you might be better off——

Mr. Powers: Oh, we can hear him if he speaks up.

The Witness: I can hear him. I was just a little confused as to what he asked me.

Q. (By Mr. Sims): Mr. Neal, in a general way, what are your duties for the Johnson Company?

A. Operating an unloading donkey.

Q. And how many years' experience have you had? [34]

A. I have unloaded, I guess, for close to fourteen years, now, twelve to fourteen.

Q. And about how many years' experience have you had in the logging industry, sawmill industry?

A. Oh, I have been with the Company twenty-five years ago last September.

Q. That is the Johnson Lumber Company?

A. Yes, sir.

Q. And you are still employed there?

A. Yes, sir.

Q. And what type of operation is this, this particular unloading? I am referring first, now, to it on a busy day. About how many trucks will come in there and discharge a load?

A. At that particular time, I imagine there was twenty trucks, twenty trucks coming in a day. That is twenty different trucks making several loads apiece.

(Testimony of Frederick Miles Neal.)

Q. And how many trips would those twenty trucks make in there?

A. Well, I couldn't judge as to how many they would make, but on an average from that particular operation they made about four.

Q. In other words, you would unload about 80 loads of logs?

A. I imagine at times we did, and sometimes more and less. It varied according to the circumstances in the woods and how they loaded out.

Q. Do you remember the day of this Hutchens accident? [35]

A. Yes, sir.

Q. About what time of day?

A. I think I gave it in about 9:30, if I remember right.

Q. Had you unloaded other trucks before Dean's—

A. Yes, sir.

Q. —and there were other trucks waiting to be unloaded?

A. Not at that particular time, I don't believe.

Q. What kind of a load did he have?

A. He had a one-log load.

Q. Do you remember anything of the dimensions of that log?

A. I never measured it. I would just guess at it; that's all.

Q. Well, give us your best impression as to its size.

A. I imagine it was 48 inches on the small end, possibly 48 feet long.

(Testimony of Frederick Miles Neal.)

Q. And when that load came in, who indicated where the truck was to stop?

A. I didn't get that question.

Q. Who indicated where the truck was to stop?

A. I did.

Q. And how?

A. With a blast of the whistle, steam whistle.

Q. That is a good, loud whistle?

A. Yes, sir.

Q. And how many blasts?

A. One blast to stop. [36]

Q. All right. Then what was the next thing that was done?

A. Well, of course, the operator of the truck came from his side around the front, and he unloosened the first bunk block—that is, taking the hook loose—passed by and picked up the line, and hooked it on the block that had swung alongside of the log as they came in, passed the second block, and fastened the hook from the bunk block on that, and went to the rear end of the machine and the rear end of the log pointing on the north end.

Q. Now, then, how are the chains when there is one log fastened at the bunk or trailer?

A. They often fasten from one bunk to the other—that is, from one end of the bunk to the other over the top of the log.

Q. Now, at the trailer what do they do?

A. That is on the trailer or either bunk, front or trailer.

Q. Do they actually tie this chain?

(Testimony of Frederick Miles Neal.)

A. I never examined the back, exactly how they are put on, but evidently they are fastened solid next to the brow log with a binder chain on the truck.

Q. To refer, now, to one log, when there is a one-log load, is it a practice, a safety practice, to tie, to actually tie, the chain at both sides of the trailer?

A. You mean to bring it under the log and tie both sides?

Q. I mean at the loading of this one log before they go out on the highway do they take their binder chain and actually tie it [37] in a knot on both sides of the trailer?

A. I wouldn't say that they tied a knot. It is fastened.

Q. That is what I mean. A. Yes, sir.

Q. It is fastened? A. Yes.

Q. And in order to be unfastened, it has to be unfastened from both sides of the trailer, doesn't it?

A. Well, you can unfasten one end at a time.

Q. Yes. You unfasten one end at a time?

A. That's right.

Q. So in order to take a chain, a 16-foot chain, or whatever the length is, and put it back into the truck, it has to be untied from both sides of the trailer?

A. Yes, sir; if you take it off, that's right.

Q. Yes. Now, then, after Dean Hutchens had pulled the sling line under the log, did you then tighten it?

A. As soon as he hooked on with the block.

(Testimony of Frederick Miles Neal.)

Q. You tightened it?

A. Yes, sir. I didn't tighten it; I brought it up taut.

Q. That is what I mean by "tighten." You made it——

A. Yes, sir.

Q. Now, then, as you sat, now, in this crane, did you have a wide-open view of that dock up and down?

A. I do. [38]

Q. So that you could readily see if a man is standing there?

A. Yes; if he is behind the log or off from the end I can see him. Direct from the end, I might not if he was behind it.

Q. And as I understand it, you got a signal from Mr. Vincent that the water was clear?

A. He gave me a signal after I had asked him to go and look.

Q. Yes. What is the next thing you did?

A. Well, I had had a signal from——

Q. Now, was——

Mr. Powers: Just a minute. I think this is his witness, and the witness is trying to explain.

The Court: This witness works for the Company. Objection overruled.

Mr. Powers: Well, there is no showing of any adversity.

The Court: He is employed, and there is an inference, Mr. Powers. This man is employed and has been employed by the defendant for twenty-five years.

Mr. Powers: That's right, but he hasn't made

(Testimony of Frederick Miles Neal.)

any mention of being an adverse witness, and under the statute it takes a particular showing to make him an adverse witness, so we will object to this proceeding on the part of counsel.

The Court: Objection overruled.

Mr. Sims: Would you read the question?

(Last question read.)

A. After I had been signaled from both sides, both ends, I [39] proceeded to dump the logs.

Q. After you got the signal from Mr. Vincent, did you get any signal from Dean Hutchens?

A. I had before.

Q. After you got the signal from Mr. Vincent?

A. No, sir; before.

Q. After you got the signal from Mr. Vincent, did you even look to see where Dean Hutchens was?

Mr. Powers: Now, I should like to object to this, arguing with the witness.

The Court: Sustained.

Q. (By Mr. Sims): Was Dean Hutchens——

Mr. Powers: What was the Court's ruling?

The Court: I ruled I sustain your objection.

Mr. Powers: Thank you.

Q. (By Mr. Sims): Where was Dean Hutchens at the time Mr. Vincent signaled to you?

A. When Mr. Vincent signaled to me, when I turned my head to Mr. Vincent, Dean, or Mr. Hutchens, was standing at the end of the log possibly four or five feet from the end.

Q. And then Mr. Vincent walked to the edge of the dock. Is that right?      A. That's right.



(Testimony of Frederick Miles Neal.)

Q. And after he walked over to the water, then did he walk back to the middle of the track? [40]

A. Came back to the side.

Mr. Powers: Object to this leading, again, your Honor.

The Court: Objection overruled.

Q. (By Mr. Sims): Go ahead, please.

A. He came back in sight of me.

Q. Then after he got—what distance did he walk? In other words, about how wide is this dock he walked across?

A. About fourteen or fifteen feet from the lumber pile he was sitting on.

Q. So he walked 14 feet over, and then he walked how many back?

A. I should say six or seven, maybe.

Q. Feet back. So, altogether, you think he may have walked about 20 feet?

A. Well, I would say close to that, possibly, altogether.

Q. Now, after he did this walking and this signaling, did you look to see where Dean Hutchens was? A. I didn't.

Q. What? A. I did not.

Q. At the time you applied the power, then you didn't know where Dean Hutchens was?

A. I had pulled the block up tight and got a signal from both ends.

Q. I am asking a question, and please, Mr. Neal, would you answer my question? [41]

Mr. Sims: Would you read it, please?

(Testimony of Frederick Miles Neal.)

The Witness: How was that question?

Mr. Sims: He will read it.

(Last question read.)

A. Well, when I rolled the log, I didn't.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Had Dean Hutchens given you a signal to roll the log? A. Yes, sir.

Q. And where was Dean Hutchens when he gave that signal for you to roll the log?

A. He was about four or five feet from the end of the log facing me. That is on the north end.

Q. And what kind of a signal did he give you? How did he signal you that all was in the clear and roll it?

A. He gave me a nod of his head and with one hand or the other he motioned over.

Q. And that meant, "Go ahead," did it?

A. How is that?

Q. What did that mean to you?

A. That meant for me to go ahead.

Q. And then after you got that signal, then in addition to the signal from him you asked Vincent to look over and see if the pond man was actually out of the way? [42] A. Yes, I did; yes, sir.

Q. And Vincent gave you the signal that he was out of the way, and you went ahead?

A. Yes, sir; he did.

(Testimony of Frederick Miles Neal.)

Q. Now, when a truck driver gives you a signal to unload, where do they go,—where do they stand?

A. Well, I wouldn't say where all of them stood, but they get in the clear, as what we consider the clear.

Q. They never go between that brow log and the log to be unloaded, do they? A. No.

Q. Now, Mr. Neal, when a truck driver comes up, who makes his load ready for unloading? Is that the truck driver, himself? A. Yes, sir.

Q. You have nothing to do with that, do you?

A. Only to tighten the line.

Q. But you don't go down where the truck is, and you are a distance away from him, aren't you?

A. Yes, the full length of the boom as it extends over.

Q. About what distance would you be away from that truck? A. I would say eight or ten feet.

Q. Yes. And he gets his load ready for unloading? A. Yes, sir.

Q. And he casts his binder chains off, and he puts the sling cable over and hooks onto your [43] line? A. Yes, sir.

Q. And you make it taut. Then he takes the bunk block out, or whatever he has got to do?

A. Yes, sir.

Q. And then does he look to see if the pond is clear? A. He is instructed to that effect.

Q. And he looks to see whether there is anybody right underneath the pond? A. That's right.

Q. Now, in looking down at the pond where this

(Testimony of Frederick Miles Neal.)

is unloaded, is he required to go between the truck and the brow log?      A. No, sir.

Q. Could he actually see down below from that point, or is the brow log too high for him to see out over there?

A. He couldn't see underneath the brow log.

Q. He can't see over there. Well, now, this day would you state to the jury whether he had any binder chain on the log when he came in there?

A. I can't say for sure that he did. He could have had, but I don't remember him ever taking it off, because he came right by from one bunk to the other with the hook, put the line on the hook, and knocked the dog out of the rear bunk and right onto the end of the log, and I don't remember him taking the chain over.

Q. Well, now, after the accident occurred, did you find any [44] binder chain there, any chain 16 feet long?      A. I never looked for a chain, no.

Q. I see.      A. I didn't see any chain.

Q. But in any event, the log was all ready as far as being loosened and ready for being rolled when you rolled it?      A. Yes, sir.

Q. And that had been done by the deceased?

A. Yes, sir.

Q. Now, counsel made the suggestion this morning that the deceased had given you a sign he was going in between the brow log and the truck. Now, tell the jury whether there is anything like that that happened.

A. He never gave me the signal ever.

(Testimony of Frederick Miles Neal.)

Mr. Sims: Just a minute.

The Court: Objection sustained.

Q. (By Mr. Powers): I will ask you, did he give you any signal other than the signal to go ahead and roll the log? A. No, sir.

Q. And there is no question but what he gave you that signal, is there?

A. There is no question.

Q. Now, about how long would it be between the time he gave you the signal to roll it and the time that Vincent told you the pond was clear? I will ask you whether it was a matter of more [45] than seconds?

A. Just long enough for Mr. Vincent to walk to the edge of the dock and back in my sight again, and you can guess your time. I couldn't. It is a matter of seconds, I imagine.

Q. Then, as I understand it, from the time that the deceased gave you the signal——

A. Yes, sir.

Q. ——to hold your load down and Vincent went over the 15 feet and a few feet back and you went ahead, and you didn't see him from then on?

A. I didn't.

Q. But before you rolled it he gave you that signal?

A. He was standing and gave me the signal from behind.

Q. What did you expect him to do,—to get in the clear or not?

A. He was already in the clear.

(Testimony of Frederick Miles Neal.)

Q. Yes. And did you expect him to stay in the clear? A. I did.

Mr. Powers: That is all.

### Redirect Examination

By Mr. Sims:

Q. Mr. Neal, whose duty is it to see that the men are in the clear before the power is applied to the log to unload it?

A. See that the driver is in the clear?

Q. Yes.

A. Well, we are not supposed to unload until he is in the clear. [46]

Q. And you didn't look again to see if he was in the clear and didn't know where he was when you applied the power, did you?

A. I didn't see him a second time.

Mr. Sims: That is all.

### Recross-Examination

By Mr. Powers:

Q. Well, now, when you say it is the crane engineer's duty to see that things are in the clear, whom do you get your signal from?

A. I use my own judgment.

Q. Well, I mean, would you ever unload without the truck driver giving a signal there?

A. No, sir.

Q. That is the truck driver's business to tell you to go ahead, isn't it? A. That's right.



(Testimony of Frederick Miles Neal.)

Q. And it is the truck driver who checks up to see when the boom man is out of the way, isn't it?

A. He is supposed to be responsible for that part of it.

Q. In going ahead with your movement, you rely upon the signal given you by the truck driver to roll?

A. I do.

Q. You have to, don't you?

A. I have to. [47]

Mr. Powers: That is all.

#### Redirect Examination

By Mr. Sims:

Q. You relied upon Mr. Vincent's signal, and on that signal you applied the power and unloaded, didn't you?

A. Yes, sir.

Mr. Sims: That is all.

#### Recross-Examination

By Mr. Powers:

Q. Well, now, wait a minute. Let's get this straight. Did you check up—was Mr. Vincent checking up to see whether Mr. Hutchens was between the brow log?

A. No, sir.

Q. Was Mr. Vincent doing anything other than seeing if the pond was clear?

A. As far as I could——

Q. Did you ask him to do anything other than check the pond?

A. I did. I asked him to look.

(Testimony of Frederick Miles Neal.)

Q. To look where?

A. I didn't talk to him. I motioned him over.

Q. To look in the pond? A. Yes, sir.

Q. And the only signal you were getting from him was that the pond was clear?

A. That's right. [48]

Q. And you had already had your signal from the truck driver to roll? A. Yes.

Mr. Powers: That is all.

The Court: Have you any more questions?

Mr. Sims: I think not, your Honor.

The Court: That is all, Mr. Neal.

(Witness excused.)

The Court: How long is your next witness?

Mr. Sims: I think about a half an hour, your Honor.

The Court: We will then take a 10-minute recess.

(Recess.) [49]

The Court: Call your next witness.

Mr. Sims: Mr. Francis.

### WILLIAM R. FRANCIS

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Francis, you live out at where?

(Testimony of William R. Francis.)

A. Sheridan.

Q. Sheridan, Oregon? A. Yes, sir.

Q. How long have you lived out there?

A. About 1925, I think.

Q. And are you the Mr. Francis that had a logging contract with the C. D. Johnson Lumber Company? A. Yes.

Q. And in carrying on that contract did you have the use of trucks and truck drivers?

A. Yes.

Q. What were those truck drivers required to do, particularly relative only to the landing at Toledo? Were they required to drive in there with their loads?

A. They were required to get a load and to deliver it to Toledo.

Q. And to whose property?

A. C. D. Johnson. [50]

Q. C. D. Johnson Lumber Company?

A. Yes.

Q. And did you pay the Johnson Lumber Company for the use of its dock?

A. They withheld a small amount from my check.

Q. They held out of your check for what service?

A. It said "Dumping."

Q. For the unloading? A. Yes.

Q. Did the C. D. Johnson people furnish the unloading crane? A. Yes.

Q. Did they furnish the unloading engineer?

A. Yes.

(Testimony of William R. Francis.)

Q. And the boom foreman? A. Yes.

The Court: One second. Can the members of the jury hear Mr. Francis?

(Various responses.)

The Court: Will you speak a little louder, Mr. Francis?

The Witness: Yes, I will.

The Court: Mr. Sims, will you go behind that jury box?

Q. (By Mr. Sims): Mr. Francis, as I understand your last answer, you said your logs were dumped there at the C. D. Johnson Lumber Company place at Toledo. Is that right?

A. Yes. [51]

Q. And that you paid to them or they held out of your check for the services of the dock, the unloading engineer, the crane, the boom foreman, and such of their employees as were necessary to unload the trucks? A. Yes.

Q. Were you truck drivers, or all of those who hauled the logs of C. D. Johnson Lumber Company, required to go to that particular unloading dump?

A. Yes.

Q. And were they required to assist the employees—

Mr. Powers: This is all leading.

The Court: I think so.

Mr. Powers: Ask him what happened.

Q. (By Mr. Sims): What happened? What were they supposed to do there at Johnson's?

(Testimony of William R. Francis.)

Mr. Powers: I think we ought to confine it to the deceased, here.

Mr. Sims: Dean Hutchens. Very well.

A. Well, I don't really know. All I could go by, the other dumps I have worked at and the like.

The Court: I can't hear a thing.

Mr. Sims: Will you raise your voice, Rouleigh? We can't hear you.

A. I believe that they were required to dump their loads, to assist the dumping. [52]

Q. (By Mr. Sims): Well, let me ask you this: Was he required to drive his truck in there under the unloading crane? A. Well, yes.

Q. And then when he got there, was he to assist——

Mr. Powers: Now, we will object to his assisting.

Q. (By Mr. Sims): Well, what was Dean Hutchens to do when he drove in there with your logs?

Mr. Powers: The contract is the best evidence. The parties put it in writing. It is the contract to deliver the logs there and they would put the sticks in the water.

Mr. Sims: There is no evidence that there was any written contract of any kind between these drivers. I don't think that is a fact.

Mr. Powers: You are talking about——

Mr. Sims: I am talking about Dean Hutchens, what he was required to do and was expected to do.

Mr. Powers: They can't change this written contract they have with us.

(Testimony of William R. Francis.)

The Court: Did you say earlier in your opening statement the contract was changed by mutual agreement between Francis and C. D. Johnson?

Mr. Powers: Yes, there was a modification of it.

The Court: What was that modification?

Mr. Powers: The modification was, as I understand it, instead of dumping the logs at Newport some 14 miles away and having [53] them rafted up, which would have cost about 75 cents a thousand, I think, Mr. Francis, here, wanted to dump them at this particular dump, to drive right in with the trucks.

The Court: Well, why can't he testify about that now?

Mr. Powers: He is not asking about the modification, and the modification was he could do that provided he be charged with the crane engineer's wages, a proportionate charge, and that charge is what we say was made.

The Court: Well, I think you can inquire as to the modifications, Mr. Sims, of the contract, and what he was required to do under the modification.

Q. (By Mr. Sims): Under the modification, under the change, what were the drivers, particularly Dean Hutchens, required to do with relation to the delivery of these logs?

A. Well, I never instructed them to do anything.

Q. Talk louder, please.

A. I say I never instructed them to do anything.

Q. How did he know where to go with the logs?



(Testimony of William R. Francis.)

A. I instructed him to take them there, yes.

Q. And what is the practice after they arrived at Johnson's dock? A. Dump the logs.

Q. What does the driver do there?

A. He helped to dump them.

Q. In what way did he go about helping? What did he do—[54] anything with reference to the sling line?

A. He would loosen his chains and put the sling line on.

Q. Were all of your drivers, regardless of how they were paid, required to do the same work?

A. Yes.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Well, Dean Hutchens, was he an employee of yours? A. No.

Q. What was he?

A. He was a contractor.

Q. He was a contract hauler. Is that right?

Mr. Sims: That is objected to, and I move the answer be stricken. It is not proper cross-examination, and it is calling for a conclusion and legal opinion of this witness. This witness is not qualified to pass upon this matter.

The Court: Objection sustained, and the jury will be instructed to disregard the answer.

Q. (By Mr. Powers): Counsel asked you what

(Testimony of William R. Francis.)

Dean Hutchens would do down there when he took the load down, and you said you didn't tell him to do anything. Will you state why it is that you didn't give him any specific instructions?

A. Well, the operations at a dump are more or less the same regardless of where you haul. [55]

Q. Well, now, in your contract you were paid a certain amount per thousand, were you not, Mr. Francis?

Mr. Sims: If the Court please, that is not proper cross-examination and doesn't make any difference here as to what his payment was from C. D. Johnson Lumber Company, as far as this written contract is concerned. If he has a right to go into it at all, he would have to offer the contract, itself.

The Court: Objection sustained.

Mr. Powers: Well, they make the contention as to who was in charge or who had the obligation of doing this unloading, and it is directed at that point, your Honor.

The Court: Do you want to make this man your own witness?

Mr. Powers: No.

The Court: This isn't proper cross-examination, Mr. Powers.

Mr. Powers: I see.

Q. As I understand, the deceased furnished his own truck. You said he was a contract hauler. Did you have anything to do with this equipment, his binder chain, or bunk blocks, or so on, or was that up to him?           A. That was up to him.

(Testimony of William R. Francis.)

Q. In other words, you told him where to deliver the logs and that is all you were interested in, that he deliver them and then you paid him so much a thousand? A. Yes.

Mr. Babcock: Just a moment. We object to that as argument [56] and calling for a conclusion and immaterial.

Mr. Powers: Everything they went into.

The Court: They didn't go into that question. The objection will be sustained and the jury instructed to disregard it, and also we will strike the statement that he was a contract hauler.

Q. (By Mr. Powers): Were you asked the question as to how you paid Dean Hutchens by Mr. Sims?

Mr. Sims: I never asked him

A. No.

Q. (By Mr. Powers): Well, now with respect to the hauling, you had a contract, in any event, for these logs—you have testified to that—to haul the logs there. Mr. Sims asked you about that?

A. How is that?

Q. You had a contract with Johnson to haul logs, did you not? A. Yes.

Q. And you undertook in your contract, did you not, to comply with all the state rules and regulations with respect to delivery of these logs?

A. Yes.

Mr. Sims: If the Court please, that, again, is outside the scope of direct examination. If he wants

(Testimony of William R. Francis.)

to make him his own witness he might shorten this up.

The Court: You asked him if he had a contract and he said "Yes." I think that Mr. Powers can go into the terms of that [57] contract, but the question is that the contract is the best evidence of those terms.

Mr. Powers: Yes, I am sure that's right. That is all, Mr. Francis.

Wait a minute.

Q. You were asked, were you not, whether you carried him as an employee on your payroll?

Mr. Sims: I did not ask him that.

Mr. Powers: Oh, you didn't.

The Court: Did you drive a truck, yourself, Mr. Francis?

A. No, I am a logging contractor.

The Court: Were you on the C. D. Johnson dock from time to time?

A. Occasionally.

The Court: I think that is all.

### Redirect Examination

By Mr. Sims:

Q. Did you actually own some of these trucks, yourself?      A. I owned one truck.

Q. That was on this run?      A. Yes.

Q. And the same duties of the driver?

A. Yes.

Mr. Sims: Well, now, if the Court please, before we let Mr. Francis go, I want to be perfectly

(Testimony of William R. Francis.)

fair with Court and [58] counsel. I don't want to let him go if there is to be any issue on the matters that have heretofore been discussed. In other words, if counsel expects to go into that at a later time and use him as his witness, I want him to know—Mr. Francis is, as he said, from out at Sheridan, about 55 miles away, and if there is any question I want him to be advised now.

The Court: Have you any objections now to Mr. Francis' being excused?

Mr. Powers: Well, it depends on how your Honor rules a little later. He has gone into these things. I was going to ask the reporter to transcribe it. I wasn't going into it now. If the Court rules one way, there is no need for him to stay. There is no need for me to have him stay. It is their contention.

The Court: Well, as far as I am concerned, he can go. If you want to hold him here, Mr. Powers, that is perfectly all right with the Court. As far as you are concerned he can leave?

Mr. Powers: Yes. The Court has stopped me from pursuing my question. The time has not arrived for me to call any witnesses.

The Court: Have you subpoenaed this witness?

Mr. Powers: I have not.

The Court: Do you want to subpoena him for yourself?

Mr. Powers: No.

The Court: You are excused. [59]

Mr. Powers: He is a third-party defendant, but he isn't connected with this issue here.

The Court: You are excused, Mr. Francis.

(Witness excused.) [60]

Mr. Sims: Mr. Nickerson.

L. W. NICKERSON

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sims:

Q. Mr. Nickerson, you live up above Sheridan, I believe. Is that right?

A. Yes, above Sheridan.

Q. You have a farm at Gopher Valley?

A. Red Prairie.

Q. Oh, Red Prairie. And at the time of this accident, I believe you were working for Mr. Francis?

A. I was.

Q. Head loader. Is that right? A. Right.

Q. Do you remember the particular load that Dean Hutchens took the morning of the fatal accident? A. How is that?

Q. Do you remember the load that he took, what kind of a load it was? A. Yes.

Q. What was the load? A. A one-log load.

Q. And do you remember how the binder chain was fastened at the [61] truck or trailer?

A. No, I don't remember just how it was. It was on the trailer, is where it was at; wasn't on the truck.



(Testimony of L. W. Nickerson.)

Q. And how was the binder chain put on at the trailer?

Mr. Powers: Well, now, he knows there was a binder chain on this load, and doesn't know how it was put on in some other case.

The Court: Sustained.

Q. (By Mr. Sims): I am asking about this particular log.

A. Well, I think that was on the bunk, on the trailer, thrown over and bound on one side. I don't know just which side the binder was on.

Q. Was there any on the truck?

Mr. Powers: We will object to that. We are concerned with when that log was delivered, not out in the woods, the condition of it at that time and not then.

The Court: You may ask your question, but I think Mr. Nickerson stated he didn't know whether the binder chain was on the log or not?

A. No; I said the binder was on the log, but I didn't know which side.

The Court: Oh, I beg your pardon.

Q. (By Mr. Sims): It was, as I understand, on the trailer. Is that right?

A. It was on the trailer. [62]

Q. Was that binder chain fastened on both sides of the trailer, do you know?

Mr. Powers: This is leading.

Q. (By Mr. Sims): Do you know?

A. Well, it was fastened on one side and thrown

(Testimony of L. W. Nickerson.)

over and bound on the other. I don't know whether it goes under the bunk or how it goes.

Q. How well did you know Dean Hutchens?

A. I knew him pretty well.

Q. Do you know what his habits of life were?

A. How?

Q. Do you know personally his habits of life, whether he was industrious, frugal, and a good driver?

A. He seemed to be, what I knew of him, a pretty good kid.

Q. About how old was he?

A. I couldn't tell you that.

Mr. Sims: You don't know his age.

You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. You say when you saw the chain, as far as you know it was tied on one side?

A. And brought under the bunk.

Q. And brought around. Now, was it, if you know, fixed so that it could be unfastened without going between the brow log? [63]

A. I couldn't tell you. I don't know which side it was bound on.

Q. Are you head loader out there?

A. Yes.

Q. Are you familiar with the code requirement that requires that any binder chain or any bunk be

(Testimony of L. W. Nickerson.)

fixed so that it can be unfastened without going between the truck and brow log?

A. I couldn't say.

Q. As head loader, you don't know whether there is such a requirement. Did you, or was it the deceased, that did the arrangement of the chains? Who was that up to—you or him?

A. How was that?

Q. Was it the deceased, Dean Hutchens, that put the chain in place, or was it you?

A. He put it there in place.

Q. He put it there in place, himself?

A. I guess.

Mr. Powers: That is all.

The Court: That is all, Mr. Nickerson.

(Witness excused.) [64]

Mr. Sims: And there is another Mr. Nickerson.

### EDWARD H. NICKERSON

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Nickerson, was that your father that just left the stand? A. Yes.

Q. And do you live at home? A. Yes.

Q. How old, about, are you now?

A. Twenty-three.

(Testimony of Edward H. Nickerson.)

Q. Twenty-three. Did you know Dean Hutchens pretty well?      A. Just as a working partner.

Q. Beg pardon?

A. Just as a working partner.

Q. Working partner. Did you see this one-log load?      A. Yes.

Q. And do you remember how it was loaded, how it was tied on?

A. I wouldn't swear to anything on that.

Q. Would you raise your voice, please? We have competition out here in the street.

A. I have competition in my throat, too.

Q. Now, will you answer that? [65]

A. I wouldn't swear as to how that was tied.

Mr. Powers: He wouldn't swear as to how it was tied.

Q. (By Mr. Sims): You are not sure how it was tied?      A. No.

Q. Were you there the morning he left with the load?      A. Yes.

Q. Were you down at the dock of Johnson Lumber Company?

A. Never have been in there that I remember.

Q. What were your general duties there at the Rouleigh Francis landing?

A. Choker setting and load that log.

Q. Did you help on this particular log?

A. Yes.

Q. You and your father?

A. No; just myself and my brother.

Q. Oh, you and your brother loaded it?

(Testimony of Edward H. Nickerson.)

A. Yes.

Q. And Dean drove the truck in and drove it out?

A. Yes.

Q. Do you remember the dimensions of the log?

A. Well, the county says nothing over 40 feet long, and we always try to give them at least 5,000 feet.

Q. Well, is the dimension at the——

A. A 5,000-foot log has 51 inches.

Q. Large end? [66]

A. Small end.

Q. The small end is 51 inches and the large is what?

A. We never measure that.

Q. What was the length?

A. Well, the county law says 40 feet.

Q. What length do you say?

A. The county law says 40 feet.

Q. 40 feet?

A. Yes.

Q. And 51 inches at the small end?

A. I wouldn't say how big it was, but we always try to give them 5,000 feet and 51 inches; 5,000 feet.

Q. Wasn't there a chain on the log when he left?

A. I don't remember, but he usually always put a chain on before he moved his truck.

Q. When there is a one-log load, what is the custom as to tying on at the trailer?

A. There is usually two ways.

Mr. Powers: We will object to any custom. He doesn't know how this was, and this was in issue.

The Court: Objection sustained.

Mr. Sims: Very well.

You may cross-examine. [67]

(Testimony of Edward H. Nickerson.)

### Cross-Examination

By Mr. Powers:

Q. It is up to the truck driver to put his binder chain on, is it?           A. Yes.

Q. And the truck driver does it?           A. Yes.

Mr. Powers: That is all.

The Court: That is all.

(Witness excused.)

Mr. Sims: Call Mrs. Hutchens.

The Court: Have you any witnesses that have to leave this evening?

Mr. Sims: Well, these employees are all anxious to leave, but if this one problem is resolved as I have it in mind I feel we can determine that and then perhaps let them all go.

The Court: You mean you won't call them?

Mr. Sims: If the ruling is as I anticipate. Now, there is a truck driver, here, and if there is any question about that, I, of course, would put him on, put him on yet this evening.

The Court: I have told you I am not going to tell you what evidence to put on. You have to make up your own mind.

Mr. Sims: Well, my associate suggests this: that perhaps [68] if we had a recess counsel can agree and stipulate as to these other facts, and if that is done, of course, that will relieve us from calling quite a number of witnesses, and save time in that regard.



The Court: All right. The jury will be excused for a period of about five minutes, during which time we will take this matter up.

(Thereupon the jury was excused for a recess, and the following occurred without the presence of the jury:)

The Court: Do you want to talk to Mr. Powers in a recess?

Mr. Powers: I just think it will take us a minute. I hope so. I will either tell him whether we will stipulate or not just as soon as he tells me what it is.

(Thereupon counsel conferred together in an undertone.)

Mr. Powers: Let's see if I can state it: that the truck drivers of Francis—just say "the decedent"—had a right under the contract to be on the premises in delivering the logs, and that the decedent, as well as other drivers, had certain duties in connection with the unloading of the logs.

Is that it?

Mr. Babcock: Yes.

Mr. Sims: Which included, if I may add—which included [69] stopping their truck according to the signal.

Mr. Powers: No, I won't stipulate to that. You have the testimony on that.

Mr. Babcock: In connection with the employees of C. D. Johnson Lumber Corporation.

Mr. Powers: I will stipulate just what I have stated here. You have already got from the wit-

nesses what they did, that he blew the whistle to stop him, and you have got all that.

The Court: I think you have. Mr. Vincent and Mr. Neal testified—particularly Mr. Vincent—as to what they were supposed to do.

Mr. Babcock: Yes. The point is, your Honor, we are trying to get a stipulation on agreed facts to make it possible for a ruling on this other question. Now, it is true that there is certain testimony there, but it is always possible that Mr. Powers might, at a later date, rebut that or offer contradictory testimony.

Mr. Powers: Well, I am willing to stipulate now that he had a contractual right to come on the premises and deliver those logs. I think that is the point you want.

Mr. Sims: That's right.

Mr. Powers: We will so stipulate.

Mr. Babcock: And he had to perform these duties in connection with the C. D. Johnson Lumber Corporation.

Mr. Powers: No; I take the position with the C. D. Johnson [70] Lumber Company that the C. D. Johnson is remote; that the truck driver has the responsibility. I set it forth, and that is our contention, and that is that a contractor, or independent contractor—if Francis is the contractor—they have to get those logs in the water. There wasn't any intermingling in the sense you have here, because the log hauler has a perfectly safe place. At this particular place he was some thirty or forty feet from the crane operator, and everything that was

done on that log, releasing the whole business, was done by the decedent, not by C. D. Johnson.

The Court: What do you want to do?

Mr. Babcock: As far as that is concerned, that can be developed, that the truck driver and the crane operator performed certain duties, to unload the log. As to who was in charge and who wasn't, that is something we can——

Mr. Powers: You have already got evidence. I will stipulate they had a contractual right to come on there, and that is what you want.

Mr. Babcock: And they performed certain functions.

Mr. Powers: And in connection with that, he had certain duties to perform.

The Court: Is that sufficient?

Mr. Babcock: I think that is sufficient.

Mr. Sims: We will put on another witness—  
Mrs. Hutchens. I think we will put her on. [71]

The Court: Call the jury back.

(Thereupon the jury returned to the jury box, and the following occurred within the presence of the jury:)

Mr. Sims: Call Mrs. Hutchens.

Mr. Powers: Do you want the stipulation to go before the jury now?

The Court: It is immaterial to me.

Mr. Powers: It doesn't make any difference to me.

Mr. Sims: Would the court reporter read it?

(Stipulation read.)

Mr. Powers: On the premises of the C. D. Johnson Lumber Company.

The Court: I don't know whether the jury understands that, but it has been stipulated as an admitted fact that Dean Hutchens and the other drivers of W. R. Francis had a right to go on the premises of the C. D. Johnson Lumber Corporation—that is, the dock—and that in connection therewith they had certain duties to perform.

### KATHLEEN HUTCHENS

the plaintiff herein, was thereupon produced as a witness in her own behalf, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. You are Kathleen Hutchens, I believe? [72]

A. Yes.

Q. And you are the lady that this lawsuit is really about? A. Yes.

Q. And Dean Hutchens was your husband. Is that correct? A. Yes.

Q. How old are you now?

A. Twenty-four.

Q. And when was your birthday?

A. May the 28th.

Q. Of what year? A. 1926.

Q. And I believe you have no children?

A. That's right.

Q. How long did you know Dean before you were married? A. Three years.

(Testimony of Kathleen Hutchens.)

Q. Were you in high school together?

A. Yes.

Q. What high school?

A. Dayton High School, Dayton, Washington.

Q. And when did you and Dean get married?

A. November 30th, 1947.

Q. And he was about how old then, Mrs. Hutchens?

A. He was nineteen.

Q. He was nineteen when you married him. And, as I understand it, you folks were living—your home was in McMinnville? [73]

A. That's right.

Q. And was he the purchaser of a logging truck?

A. Yes.

Mr. Powers: That is all admitted.

Q. (By Mr. Sims): And, in a general way, Kathleen, would you tell approximately what his earnings were a month, approximately?

A. Well, I really can't say to that. Do you mean when he was driving truck, his net income?

Q. That's right.

A. Well, fifteen or eighteen hundred dollars a month, something like that. That was the net income.

Q. You mean net, or gross?

A. Well, gross, it is.

Q. And the net income would be—would you say approximately \$300 a month?

A. Yes, I would say so.

Q. And do you know about how much he earned during 1949 between January and August?

(Testimony of Kathleen Hutchens.)

A. Between January and August?

Q. That's right. A. No, I don't.

Mr. Sims: And I am sure that the income tax records are here, and I think counsel has seen them.

The Court: Why don't you stipulate instead of asking this witness, who doesn't seem to know? [74]

Mr. Sims: Well, maybe we will do that and offer in evidence at this time, then, the income tax records. Counsel, I believe, has seen them.

The Court: Any objection?

Mr. Powers: No, I have no objection, your Honor. Put them in.

The Court: Well, they may be marked and introduced.

(The U. S. Individual Income Tax Returns for H. D. and Kathleen Hutchens, for 1948 and 1949, so offered, were thereupon admitted in evidence and marked as follows: 1948 income tax return as Plaintiff's Exhibit 19; and 1949 income tax return as Plaintiff's Exhibit 20.)

Mr. Sims: And may we pass the reading at this time, your Honor?

The Court: That is perfectly all right.

Q. (By Mr. Sims): Kathleen, will you tell us a little bit about Dean's habits of life, as to industry and frugality?

A. Well, he was a very good worker, saved his money. He was a very good person, and he was very well liked. He had no bad habits. He didn't drink or smoke.



(Testimony of Kathleen Hutchens.)

Q. Did you folks graduate from Dayton High School?      A. That's right.

Q. That was back in when? [75]

A. I graduated in 1945 and he in 1946.

Q. What would you say he did with his money in a general way?

A. Well, he made his car and truck payments.

Q. Do you know how much the truck payments were?

A. He bought the truck in July of 1948. His truck payments were \$315 until April of '49, and he had his truck made into a six-wheeler, and then the truck payments were \$400 a month.

Q. And did he make the payments?

A. Yes.

Q. Was he buying a car? Did you have a family car he was buying?

A. When we were married he had a '46 Chev, and he traded it in on a '48 Hudson, and he was finishing paying for it.

Q. Well, did he spend his money personally on himself, or did he provide well as far as his wife was concerned?

A. He provided very well, yes. I never wanted for anything.

Q. Did he have any special training in the mechanical field or that sort of thing?

A. He was a very good mechanic, and he was——

Q. And what, perhaps, particularly did you have planned for the future, the two of you?

(Testimony of Kathleen Hutchens.)

A. We planned on going back to Dayton and buying a farm.

Q. You were going to have a home on a farm at Dayton, Washington? A. Yes, that's right.

Q. What, Kathleen, in a general way, was his health? [76] A. He had perfect health.

Mr. Sims: I think you may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Mrs. Hutchens, just a question or two. Let's see. I think that you said Dean graduated about '46, was it? A. That's right.

Q. And you graduated the year before?

A. That's right.

Q. Was that Dayton, Washington?

A. That's right.

Q. And where is your residence now? Where do you live now?

A. Well, I have no permanent address. I am staying with my sister-in-law at Dayton, Washington.

Q. Up at Dayton, Washington?

A. That's right.

Q. And now when you got through high school, did you start to work, yourself?

A. No; I stayed at home most of the time.

Q. You stayed at home most of the time?

A. That's right.

(Testimony of Kathleen Hutchens.)

Q. And then when was it that you started to work?

A. Well, I don't really recall. I didn't work very much. I stayed at home because of ill health and my grandmother.

Q. Well, you did take some position, I think you said in your [77] deposition, if I remember correctly. Weren't you working in a restaurant somewhere?

A. I worked in an ice cream parlor for awhile.

Q. Up in Dayton? A. That's right.

Q. And then have you been working lately?

A. Yes, I have.

Q. And where do you work now, please?

A. I work in the Blue Mountain Cannery at Dayton.

Q. The what?

A. The Blue Mountain Cannery in Dayton.

Q. I see. And when you lived in Oregon, where did you live here? Was it is McMinnville?

A. That's right.

Q. Did you have a house there, or——

A. We had a house.

Q. There have been no children born?

A. That's right.

Mr. Powers: I think that is all.

Mr. Sims: One thing I should have asked on direct, and that is with reference to funeral expenses, your Honor. May I?

Mr. Powers: We will stipulate whatever you have in there.

(Testimony of Kathleen Hutchens.)

The Court: Is there any disagreement?

Mr. Powers: No.

Mr. Sims: Thank you very much.

I think that is all.

(Witness excused.) [78]

Mr. Sims: Mr. Hutchens.

### DORSEY HUTCHENS

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. You are Dorsey Hutchens? A. Yes.

Q. How do you spell your given name?

A. D-o-r-s-e-y.

Q. And are you a brother-in-law of Kathleen's?

A. Yes.

Q. And then Dean, of course, was your own brother? A. Yes.

Q. And how many in your family, Dorsey?

A. Four children.

Q. Four. And how many were boys and what did it consist of? A. Three boys and one girl.

Q. And the girl, what is her name?

A. Mrs. Barr.

Q. Is she the oldest? A. Yes.

Q. And where was Dean in this—was he the youngest or second?

(Testimony of Dorsey Hutchens.)

A. He was the youngest, yes.

Q. Your sister was the oldest, and then you were next? [79]

A. No, my other brother is next.

Q. That is Lee? A. Lee.

Q. And then you, and Dean was the baby?

A. That's right.

Q. And did you see Dean quite frequently during the last few years of his life, high school days? Did you see him often?

A. Not too much until the last two or three years, possibly after he got out of high school.

Q. And what would you say as to your brother's habits of life, Mr. Hutchens?

A. Well, I thought he was very careful in his work. He was very determined to accomplish what he started after.

Q. What would you say as to his habits with relation to money?

A. I think he took care of it as wisely as he could.

Q. How did he get along with his wife and treat her with reference to money matters, if you know?

A. I think she always had what money she wanted.

Q. And did they drive and have a family car?

A. Yes.

Q. And do you know about the logging truck that he was buying? A. Yes.

Q. Do you know what the name of the truck was? A. International.

(Testimony of Dorsey Hutchens.)

Q. And the usual logging truck, I understand? [80] A. Yes.

Q. What would you say as to Dean's habits as to sobriety? Did he drink or smoke?

A. Not that I ever knew. I think I would have known it.

Mr. Sims: You may cross-examine.

Mr. Powers: No questions. Thank you.

The Court: That is all, Mr. Hutchens.

Mr. Sims: Your Honor, there is another line of questions I want to go into with this witness dealing with the industry, itself, but I thought the time wouldn't justify it in view of the closeness of time.

The Court: How many more witnesses have you?

Mr. Sims: I think just three or four.

The Court: Are they long or short?

Mr. Sims: I don't think any of them will be very long. I expect we will be through during the morning.

The Court: During the morning?

Mr. Sims: Yes. I am going to suggest to counsel when we do adjourn that if he has witnesses to put on he should have them here tomorrow morning because I don't expect us to take all day tomorrow. I think we will be through before the noon adjournment.

The Court: How about you, Mr. Powers?

Mr. Powers: I am going on the basis that we are going to finish tomorrow, so we will get through tomorrow one way or [81] another.



(Testimony of Dorsey Hutchens.)

The Court: What does that mean—5:00 o'clock?

Mr. Powers: As I recall it, you said we would keep on going until 12:00.

The Court: Well, I am not going to.

Mr. Powers: Well, if counsel finishes mid-morning, I should think we would be through certainly by 5:00 o'clock tomorrow. I will do everything I can to expedite it, and probably get it to the jury tomorrow afternoon.

The Court: In view of that fact, we won't instruct them until Thursday morning, so that we won't have to run overtime unless you anticipate any long witnesses. We will see how it goes off tomorrow morning, and then we may start at 1:00 or 1:15 and keep going through.

Would you prefer putting on Mr. Hutchens tomorrow again?

Mr. Sims: Yes, I would, your Honor. I wanted to reserve that right. In other words, I thought I would take care of the family situation and get away from that, and then get right on into the merits.

Mr. Powers: If it wouldn't take long, couldn't we dispose of it now? We have five minutes.

Mr. Sims: We can't do it in five minutes.

The Court: All right.

You may step down, now.

(Witness temporarily excused.) [82]

The Court: Would you prefer coming back at 9:30 tomorrow, or 10:00 o'clock?

Mr. Powers: I hope they are going to say 10:00 o'clock. Now, your Honor, you want instructions out, and——

Mr. Sims: We agree on that.

Mr. Powers: ——by the time I get through here the stenographer is gone, and if we are going to write our instructions between 9:00 and 9:30, I probably wouldn't have them here.

Mr. Sims: That would let us go on a little happier note. Mr. Powers and I are in complete accord.

The Court: We will now adjourn until 10:00 o'clock tomorrow morning.

Now, let me announce again, don't discuss this with the other jurors or members of your family. You will have plenty of time to discuss it when it is submitted.

We will adjourn until 10:00 o'clock tomorrow morning.

(Thereupon an adjournment was taken until 10:00 o'clock a.m., tomorrow, Wednesday, June 21, 1950.) [83]

Wednesday, June 21, 1950

The trial was resumed, pursuant to adjournment, at 10:00 a.m., and the following further proceedings were had herein:

The Court: Mr. Sims.

Mr. Sims: Your Honor, I wanted to continue with the brother, Dorsey, but he isn't here yet, apparently has been detained, and I wonder if I might call another witness.

The Court: Yes.

Mr. Sims: Mrs. Barr, please.

NADINE BARR

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sims:

Q. Mrs. Barr, I guess you didn't know I would call you as a witness this morning. I am only going to ask a question or two. You are, I believe, the sister—I guess the only sister—that Lee and Dean and Dorsey have. Is that right? A. Yes, sir.

Q. In other words, the family consisted of four of you children? A. That's right.

Q. And you are about how old now, Mrs. Barr?

A. I am thirty-seven.

Q. You are thirty-seven. And Dean was the baby of the family [84] and twenty-one?

A. He was twenty-one when he was killed.

Q. And throughout his entire lifetime were you constantly in touch with him? A. Yes, I was.

Q. And what would you say as to his habits of life, his frugality, drinking and smoking, and what he did with his money?

A. He neither drank nor smoked nor gambled, and he worked hard from the time he was a very young boy, and saved his money and put it always to a good use.

Mr. Sims: You may cross-examine.

Mr. Powers: No questions. Thank you, Mrs. Barr.

Mr. Sims: Thank you, Mrs. Barr.

(Witness excused.) [85]

Mr. Sims: And Mr. Hutchens, please.

### GEORGE HUTCHENS

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Hutchens, what relationship do you have to Mrs. Barr and Lee and Dean and Dorsey?

A. I am their father.

Q. You are the father. And just a question or two, Mr. Hutchens. What would you say as to the kind of a boy Dean was with reference to his habits? Did he smoke and drink? Did he gamble?

A. No, sir; he didn't do none of those.

Q. And what would you say as to the way he handled his money?

A. He was very careful and conservative with his money.

Mr. Sims: I think that is all.

Mr. Powers: No questions.

Mr. Sims: Thank you.

(Witness excused.) [86]

Mr. Sims: Mr. Peoples.

RALPH W. PEOPLES

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sims:

Q. Mr. Peoples, whereabouts do you live?

A. I live at Yelm, Washington.

Q. Where is that?

A. That is in Thurston County about 33 miles south of Tacoma.

Q. And how old are you?

A. Approximately forty-five.

Q. And what is your particular training and background, Mr. Peoples? What type of work have you done for the last—well, let's say thirty years?

A. I have been a workman in the lumber industry since 1919, principally.

Q. And when you say "the lumber industry," what type of work do you include?

A. Well, that includes logging and sawmill work. My work has been principally in the logging end of it.

Q. Now, in the logging end of it what have you done? What jobs and positions have you held?

A. Well, I started out in the days of the steam donkeys, and for awhile I split wood and fired donkeys and worked as a signal [87] man and powder man and choker setter, rigger.

Q. Now, you are getting ahead of us a little bit.

(Testimony of Ralph W. Peoples.)

Let us go back. What is a steam donkey man? What do you mean by that?

A. Well, the work, the yarding of logs, was accomplished with donkeys that were powered by steam engines, and my work was to supply fuel and fire the boilers to generate steam for the operation of these engines.

Q. Now, you said "signal man." What is a signal man?

A. Well, he is a man who takes a position in the woods in the vicinity of the rigging crew and transmits their signals by means—in those days a jerk wire.

Q. Anything like a whistle punk?

A. Well, it is all the same.

Q. And then you mentioned choker setter. What is a choker setter?

A. Well, these logs are moved from the woods by lines, and the short piece of a line that is used to attach the log to the butt rigging is called the choker, and the choker setters are those men in the woods who place that line in position around the logs so that they may be dragged into the landings.

Q. You used the word "yarding." What do you mean by that?

A. Well, the term "yarding" refers to the movement of logs from where they lie at the trees which have been felled and bucked into logs to their first point of rest. In some cases it is along a roadway or in others it is a spar tree some [88] distance from a roadway, and they have to be moved again



(Testimony of Ralph W. Peoples.)

by other machines to a place where they can be loaded upon cars or trucks.

Q. When you say "spar tree," what does that mean? What do you refer to there?

A. Well, a spar tree is a tree that is either standing in its natural position or has been moved or raised from another place in which the blocks are hung that the line renders through to bring the logs from the woods.

Q. All right. Now, you go ahead with your next. I stopped you when you said that you had done some choker setting. What else is there?

A. Well, I worked as a powder man.

Q. All right. Now, what is a powder man?

A. Well, in the operations where I worked at the powder man's job was to principally to see that there were holes under the logs at the appropriate places for the rigging men to set the chokers. If there wasn't a natural opening there it was my business to set a charge of dynamite and blow a hole there big enough for them to put the line through, and in addition to that, why if there were stumps that were in the way that had to be removed or dirt that had to be moved, it was my responsibility to place the charges and set them off.

Q. All right. Now, what else did you do in the woods logging?

A. Well, I have done some rigging. [89]

Q. All right. Now, as a rigger, what is that?

A. Well, the rigging, as I refer to it, consists of helping to put the rigging up in the spar trees,

(Testimony of Ralph W. Peoples.)

move the donkeys into their setting and get the lines strung and in proper position to start logging, and some of that rigging work has been in connection with slack line and skidder operations, which is a yarding operation of a little different type, where it is necessary to rig trees at the backside of the yarding show, and I have worked at that, and that is included.

Q. Have you had anything to do with the trucking end of the logging industry?

A. Yes, I have, a little.

Q. Well, what other things have you had to do now with the logging industry? Does that about cover it?

A. Well, in recent years I transferred from the rigging end of it to the cutting crews, and I worked for a number of years in the falling and bucking and scaling of logs.

Q. Now following and bucking includes what work?

A. Well, that includes taking tools into the woods to where these trees are standing and falling the trees to the ground and cutting them into log lengths.

Q. All right. Now, what else have you done?

A. Well, that covers pretty well, except for a short while I worked as a truck driver. It covers pretty well the experience I have had as an actual employee of logging companies, although [90] in recent years I have worked with the logging industry rather than actually for it.

Q. And are you familiar with the dock and the

(Testimony of Ralph W. Peoples.)

facilities of the C. D. Johnson Lumber Company at Toledo?      A. Yes, in a general way.

Q. What was your first introduction to that?

A. In 1924 as a construction hand for the Wardmeyer Construction Company I worked in the construction of their dock facilities there.

Q. Are those the dock facilities that are still in use and include the unloading dock?

A. I believe so.

Mr. Sims: If the bailiff would kindly hand the witness the photographs in evidence, with the exception of the photograph of Dean Hutchens.

Q. I will ask, Mr. Peoples, if you recognize any of those pictures as pictures of the dock and facilities where you worked, the facilities you helped construct in 1924.

A. Well, Exhibit No. 3 is not recognizable by me. It could be 'most anywhere. Exhibit No. 4 appears to be looking from the landward end out towards the south.

Mr. Powers: I don't know what counsel is trying to prove, but I can probably stipulate if he has some point in mind.

Mr. Sims: Well, the point is to identify merely——

Q. Is this the dock, now that you have scanned some of the [91] photographs? Is this the dock on which you worked back in 1924?      A. Yes, sir.

Q. Now, have you had any special interest or special work with reference to safety matters in connection with the industry?      A. Yes, sir.

(Testimony of Ralph W. Peoples.)

Q. And what has that consisted of?

A. I was employed for three years by the Oregon Industrial Accident Commission in their Safety Division, and I am presently employed and have been for two years by the Department of Labor and Industries of the State of Washington in their Safety Division.

Q. Now, what do those duties—in other words, the last five years of your life have been devoted to work for the State of Washington and the State of Oregon in the Division of Safety—is that correct—with reference to this industry?

A. Well, there was a break in my employment in between my employment by the State of Oregon and the State of Washington of a couple of years, sir.

Q. But you have altogether put in this much time in the safety field?      A. Yes, sir.

Q. Now, the Department of Labor and Industries of the State of Washington, is that similar in a general way to what we in Oregon call the State Industrial Accident Commission?

A. Yes, it handles the same functions that the Oregon Industrial [92] Accident Commission does, with some additional responsibilities.

Q. Now, what are your duties in a general way where you are now employed by the State of Washington?

A. I am a safety inspector in logging camps.

Q. Well, now, what do those duties include?

A. Well, it is my duty to make physical exami-

(Testimony of Ralph W. Peoples.)

nations of the premises and machines and rigging that are used in logging, and to observe the operation for unsafe practices, and it is my job to call attention of management and workmen, as well, to any unsafe conditions or unsafe practices that I find and ask that they be corrected.

Q. Do you give any particular attention to log unloading dumps?           A. Yes, sir.

Q. Now, in this particular case, Mr. Peoples, knowing this dock as you do at Toledo, what would you say would be the safe and proper practice in the matter of handling unloading of logs where a dump is handling the unloading and the unloading engineer tells you that about 80 loads a day, that that would be a good, big workday for them? He didn't say how low it would go, but I assume some less. I don't know if it is a half less, but if you unload about 80 loads, now, what would be the safe practice with reference to having a safety man to observe that all men were in the clear before there was an unloading?

Mr. Powers: I would like to ask the witness a question [93] before he answers, your Honor.

Mr. Sims: No objection.

Mr. Powers: How long since you have seen the dock at Johnson's, Mr. Peoples?

A. The last time that I made a close—anywhere near close observation of that dock, sir, was about ten years ago. I have seen it from a distance more recently.

Mr. Powers: You actually haven't observed it



(Testimony of Ralph W. Peoples.)

closely for a period of ten years?           A. No, sir.

Mr. Powers: And the particular dock or brow log, this No. 3 log that we are talking about, you don't know anything about that, do you?

A. No, I wouldn't.

Mr. Powers: I don't think the witness should be allowed to say. I don't think that the number of trucks involved has any bearing. There was only one truck here at the time to be unloaded, and the number that comes in—his crane can only unload one truck at a time, so I don't think——

The Court: I don't think he has asked sufficient facts to give a sufficient description of the unloading dock and facilities there.

Mr. Sims: Very well. Will you return the pictures, Mr. Bailiff?

Mr. Powers: I might state that this dock was only built [94] two years ago.

Mr. Sims: Well, the pictures——

Q. I will ask you to go ahead and review all of the pictures, having in mind the question I am asking is with reference to that particular dock, and we can narrow it down to just the unloading of, as counsel says, one truck at a time, as to whether it is a proper and a safe practice to have a safety man on the dock with no other duties than to see all men are in the clear and that the operation is conducted safely.

Mr. Powers: I don't think that calls for expert testimony. It is for the jury, I submit, to conclude. The jury has heard all the facts.



(Testimony of Ralph W. Peoples.)

Mr. Sims: That is a subject of——

Mr. Powers: Not the subject for an expert.

Mr. Sims: The Company's foremen have already testified that it wouldn't be practical, that they wouldn't want a safety man there. I think we have a duty to the jury to explore that so they will know what is a safe practice. A man with 30 years' experience and five years as an employee of the states of Washington and Oregon, with particular training in that field, I think would be very helpful to a jury, and he certainly has special knowledge of this particular dock, and I feel I have a duty to the jury to explore it.

Mr. Powers: Where is there any charge of failure of a safety man to be on the dock? [95]

Mr. Sims: It is there in Paragraph 3, I think, of the contentions.

Mr. Powers: Just give me the number, and I will find it.

Mr. Sims: I haven't the pre-trial order. Page 8, I believe, covers it.

Mr. Powers: That doesn't call for any safety engineer.

Mr. Sims: Insufficient workmen is something we charge.

Mr. Powers: This is opening up new issues, your Honor.

Mr. Sims: Oh, no.

The Court: Look at Subdivision 7.

Mr. Powers: Well, that still is a new issue, nothing about any safety engineer that I can see in there.

(Testimony of Ralph W. Peoples.)

The Court: I will sustain the objection on that ground.

Q. (By Mr. Sims): What would be the safe and proper practice of having another workman on the dock for the purpose of seeing that all men are in the clear, one man only to give signals as to the unloading?

Mr. Powers: We will object to that. That is for the jury to conclude, your Honor.

The Court: Objection overruled.

The Witness: Will you read the question to me, please

(Last question read.)

A. Such a procedure would be a safe and practical means of operating.

Q. (By Mr. Sims): What would you say as to the safe and proper [96] practice of the use of a blast of a whistle, some loud, audible signal, to indicate that the unloading was about to take place? Would that be a safe and proper practice, in your opinion?

Mr. Powers: Same objection, your Honor; doesn't call for any expert.

The Court: You may answer the question, Mr. Peoples.

A. Such a means would be practicable and assist in the safety of the operation.

Q. (By Mr. Sims): The evidence here is that the unloading engineer was the man whose duty it was to see that the men were in the clear. Now, my question, Mr. Peoples, is that after a signal

(Testimony of Ralph W. Peoples.)

has been given and there is an interval during which time another workman walks at least 20 feet and then gives a signal, what is the safe and proper practice as to whether the unloading engineer should again observe the first workman and again get his signal from him or see where he is?

Mr. Powers: Same objection. It invades the province of the jury.

The Court: Objection sustained.

Q. (By Mr. Sims): If there is an interruption between the signals, what is a safe and proper practice as to the unloading?

Mr. Powers: Same objection.

The Court: Objection overruled.

Mr. Powers: It isn't a proper hypothetical question. What is an interruption? The witness testified it was a matter [97] of seconds. Now, this clearly, in my opinion, invades the province of the jury. The jury heard the witnesses, and they are in just as good a position as anybody else to hear.

The Court: In order to meet Mr. Powers' objection, will you state additional facts?

Mr. Sims: There is no evidence as to seconds. The only additional facts that I know of to give the witness are these: that he says a signal was given by a truck driver, and that he observed a man who was on some planks near the unloading crane, and he sent him a distance of about 14 feet over to the face of the dock to look down on the water and see if the men were in the clear on the water. The man walked back—he doesn't know, but he

(Testimony of Ralph W. Peoples.)

estimated about six or eight feet—until he was about the center of the dock, about the center of the truck, and at that time gave a signal. Now, my question is, what would be the safe and proper practice as to observing, giving attention to, the first workman?

The Court: I think on that I am going to sustain the objection, because that is precisely one of the questions that the jury is going to have to answer.

Q. (By Mr. Sims): Is it a safe and proper practice for an unloading engineer to unload without observing where workmen are that might be affected by the unloading?

Mr. Powers: The same objection, your Honor.

The Court: I think this is a little different. Objection [98] overruled.

The Witness: Will you read the question, please?

(Last question read.)

Mr. Powers: The hypothetical case must be given to any expert. The jury has heard the testimony here, and it is up to the jury. The jury heard the witness testify that it was a matter of seconds, that the driver did give the signal to unload, and he asked the other fellow by signal to look in the water, and he looked, and he said it was a matter of seconds that he went ahead.

The Court: I think he is merely testifying as to good practice in the logging and mill operations, not as to this particular accident.

(Testimony of Ralph W. Peoples.)

Mr. Powers: I don't see where the good practice enters into it. They are not charging any violation of good practice. They are charging violation of the Employers' Liability Act, which relates to devices and appliances.

Mr. Sims: They are charged here with the use of every care and device and prescription practical without impairing the efficiency of the work, regardless of expense, to all persons and generally the public, as might be affected by this thing involving a risk or danger, and I do feel that it is our duty to develop that particular fact as to whether generally the unloading engineer should observe those in an immediate area and know where they are before he unloads. [99]

Mr. Powers: That is the fallacy of it. In my opinion, the act doesn't apply to a human failure. It applies to some mechanical or apparatus defect, and what he is going into is the conduct, actually the conduct, of the crane engineer. There is no statute that can charge or require any employer to try to furnish a better engineer than somebody else. The statute is designed to furnish safe equipment and appliances.

Mr. Sims: It applies to the human being.

Mr. Powers: It doesn't apply to the human mind.

Mr. Sims: It certainly does.

The Court: The question is, as I understand it, whether the loading engineer should be in position

(Testimony of Ralph W. Peoples.)

to see men who might be affected by the unloading of logs.

Mr. Sims: That is what I mean, exactly.

The Court: You may answer the question.

Mr. Powers: And may I have an exception.

A. Yes, he should be.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Let's see. Were you in Oregon when the Safety Logging Code was enacted, Mr. Peoples?

A. Yes, sir.

Q. When was that?

A. 1943—1944, I believe, it actually went into effect. [100]

Q. Actually October 25, 1944, was it not?

A. Yes, sir.

Q. Then you were here how long after that?

A. Well, I lived here in Oregon until May of 1948.

Q. Working as inspector, I mean.

A. Well, I was with them until early in 1946.

Q. Yes. Now, that operation, the Safety Logging Code, that applies to dumping logs such as we are talking about here, doesn't it? A. Yes, sir.

Q. And there is no requirement in there about any whistle before you make your unload, is there?

A. No, it doesn't require it.

Q. No, sir. Now, as a matter of fact, taking these things one by one, is it not a safer operation to



(Testimony of Ralph W. Peoples.)

make a visual inspection and see whether a man is safe and in the clear rather than blow a whistle and go ahead and dump?      A. Yes, I think it is.

Q. For instance, a pond man might be down below and you blow a whistle and he might not have a chance to get out of there before you dump, and that might be dangerous in that instance. Is that not a fact?

A. Yes; in such an instance it could be.

Q. So a visual look would be preferable. Now, with respect to the crane operator being in a position to see that the men [101] were in the clear—we will put it that way—or the one man, the truck driver is in the clear—you felt that he should be in a position to see that the truck driver is in the clear before he moves the log. Is that not correct?

A. Yes.

Q. Well, now, where the truck driver gives a signal to move the log, don't you feel that the crane engineer has got some work to do in lifting that log to go ahead and move it?

Mr. Sims: Just a moment, your Honor. That is not the state of the record. This witness said he saw a signal and he saw a signal and held his hand in this fashion (indicating), so let Mr. Powers give the true record and not the interpretation of the record. Let counsel show.

Mr. Powers: We will leave it to the jury, if there is any question. Mr. Neal said the truck driver gave him a signal to move the log.

Mr. Sims: Not in that fashion.

(Testimony of Ralph W. Peoples.)

The Court: Objection overruled. You may answer the question, Mr. Peoples.

The Witness: Will you read the question, please?

The Court: Will you repeat the question to him, Mr. Powers?

Mr. Powers: Yes. I will rephrase it this way:

Q. In the Logging Safety Code, a truck driver is prohibited from going between the load of logs and the brow log, is he not?

A. I believe any workman is. [102]

Q. Yes. And that is part of the Safety Code. Now, would you say that in order to have a more safe operation that the engineer, the crane engineer, would have to be in a position where he could see someone, where he would have to get—in order to get there so it would not be a violation of the Safety Code, he would have to see through this log or this load? A. No, sir.

Q. No. And you would agree with me, would you not, that a crane engineer would have a right to rely upon a truck driver when he gives a signal to roll or to lift it, that that truck driver would take a place of safety when there is one open, would you not? A. Not necessarily.

Q. Well, what should he do? Should he continue after the truck driver gives a signal to unload to watch this driver all the time?

A. He should see to it before he starts to lift that the driver is in the clear or that he knows where he is.

Q. Well, now, when the driver gives the signal

(Testimony of Ralph W. Peoples.)

he is in the clear—according to the testimony he is 6 feet back of the log, clear back of the log, when he gives the signal to unload. Do you feel that the crane operator then with his other work should keep watching him, or should he go ahead with his unloading? What would you expect as an engineer in carrying [103] on this work?

A. I would expect that the crane operator should keep his eye on whoever is responsible for giving him the signal to unload in case anything goes wrong so he might respond to any other signal that might be given.

Q. You don't think that he should be actually rolling the log and operating his crane then. He is supposed to be doing both at the same time?

A. He can be doing that and still watch for signals, sir.

Q. In other words, he should not rely, in your opinion, upon a signal given by a driver?

A. Not entirely.

Q. No. Now, let's get to the third point. You felt there should be perhaps another man around there to give a signal, did you?

A. Yes, I think so, and to supervise the general work of the unloading.

Q. Well, now, if you have got another man giving the signal you have got two men to look out for, haven't you?

A. In that case, the man who gives the signal is the one who is responsible for looking out for the truck driver.

(Testimony of Ralph W. Peoples.)

Q. Well, now, if the crane engineer, in operating, doesn't need to be looking at what he is doing and can look at the man giving the signal, the driver, why would you need any second man? [104]

A. We find that it is advisable in operations where numerous trucks are hauling in to have someone in charge to see to it that everybody is in the clear before a signal is given to unload.

Q. You are talking about some other safety engineer, now, aren't you, now—not just an additional workman? A. Sir?

Q. Are you talking about a safety engineer on the job, or just an additional workman around to do that?

A. Well, someone there to supervise the work. Ordinarily they assist in the placing of lines, releasing of binders, and so forth. Their sole duties would not be, in my opinion, just to stand there.

Q. I see. You think someone should be there to help the truck driver get his load ready for unloading. Is that it?

A. And to see that it is safely done; yes, sir.

Q. In other words, there would be two men working around the truck? A. Yes.

Q. Well, now, wouldn't that put an additional man down there, we will say, in a dangerous position? You will have two men there instead of one?

A. Well, that would be one way of looking at it.

Q. And then if they both gave a signal, one man would signal down here and you have to look at

(Testimony of Ralph W. Peoples.)

the other one and where would [105] you stop?

A. No; only one man would give the signal.

Q. Well, so if the truck driver here was one man giving a signal, why wouldn't his signal be as good as some other man's? (Pause.) Well, we will pass that. You are familiar with the rule that the truck driver or the truck hauling logs must have their chains so that they can be unfastened on the opposite side of the brow log, are you not? A. Yes, sir.

Q. And in hauling of logs, there, with your experience, is that not the way that the bunk chains are fixed, so that you can unfasten them from the opposite side of the brow log?

A. That also is required; yes, sir.

Q. That is required, and that is the way it should be done, isn't it? A. Yes, sir.

Q. And if someone had any bunk chains or any binder chains fixed so they would have to go between the loaded trucks and the brow log in order to unfasten it, that would not be a safe practice, would it? A. No, sir.

Q. As I understand your testimony, Mr. Peoples, you felt where there is a large number of trucks coming in maybe an extra man should be there. What if you used a few trucks coming in. two or three trucks a day? [106]

A. Well, normally, sir, where the operation of a log dump is not very heavy—that is, there is not a large volume of logs to be handled—the workmen will take more time to see that proper precautions



(Testimony of Ralph W. Peoples.)

are taken, but as the volume increases there is a tendency to hurry along, and in cases where the volume gets up about——

Q. Not your reasoning about it. What would you say about it where they have only two or three there? Would you say there should be an extra man, or three truckloads a day?

A. No, I think where only two or three truckloads are coming in a day that the operator of the dump machine and the truck driver can successfully and safely handle those without extra help.

Q. So in this case where there were no other trucks there except this one truck which the deceased was operating——

Mr. Sims: Just a moment, your Honor. The only proof on the subject is that there were about twenty trucks, as I understand it, that were coming in here. There is no evidence—and I think I am at liberty to say that there will be no evidence—that this landing ever conducted this operation with two or three trucks coming in a day and no others. The record before us is that there were about twenty trucks making about four trips a day apiece, and in fairness to the jury I don't think counsel should be permitted to pursue this matter where there is only two or three a day, because it does [107] violence to our records and facts.

The Court: Yes. I think that is not the question he is asking, and under admitted facts, Paragraph No. 7, page 3, of the pre-trial order, it is admitted that at the time of the accident there was only one truck on the premises being unloaded.



(Testimony of Ralph W. Peoples.)

Mr. Sims: That's right.

The Court: I think this is proper cross-examination and the objection is overruled.

(Last question read to point of interruption.)

Q. (By Mr. Powers): —where the deceased was operating, no reason why there should be any extra man there at that time, would there be? In other words, under your testimony you say where they just have a few trucks coming in that the driver, himself, is all right. Now, here at the time of the accident the deceased was the only truck driver there. If it worked in one case it should work in another. Is that not right?

A. Yes. It will work any time if they take time enough to make it work.

Q. Well, in this particular case all the arrangements for the unloading and the giving of the signal were up to the deceased, the truck driver—

Mr. Sims: That, again, your Honor, is argumentative and isn't the case.

The Court: I think that that is true. The objection will [108] be sustained.

Mr. Powers: Yes. I should like to give a hypothetical question, then.

Q. Assume, then, now, if you will, Mr. Peoples, that the deceased's was the only truck to be unloaded on the premises at the time of this accident, and assume that the deceased truck driver had no one to help him with his unfastening the load or

(Testimony of Ralph W. Peoples.)

getting the load ready for rolling or dumping, and that the deceased did proceed to get the truck ready for dumping; then, as I understand it, the only one that could be hurrying—or I will put it this way—if the deceased took time and didn't hurry, then there would be no reason why—no reason for requiring any extra man?

A. Well, of course, there are actions of others that might enter in, there, sir.

Q. Just take the hypothetical case, there, because there was no one else there helping him doing that.

Mr. Sims: Just a moment. The evidence is somewhat different. Mr. Vincent was there and did give a signal, and the engineer did unload, he said, on the signal of Mr. Vincent.

The Court: I am going to sustain the objection because I don't think all the facts are presented in the hypothetical question.

Mr. Powers: Yes. Maybe I can stand and present them.

Q. I am talking, now, about this witness' testimony with [109] respect to having another workman or some safety man there. We will put it that way. As I understand his testimony—there may be no need for this—you feel that where the operation is a small one that is not required, and you further feel that one reason for it is that when the operation, there, is only one truck, there, or only a few trucks a day, that they are not hurrying. Is that correct?

(Testimony of Ralph W. Peoples.)

A. Yes, I think that is generally so.

Q. They take more time. Now, I am asking you this question: Where the work of fixing the load, making the load ready for dumping, is done entirely by the truck driver, did you have in mind that the truck driver wouldn't have to hurry so much?

Mr. Sims: That is just the objection.

Q. (By Mr. Powers): Is that what you had in mind?

The Court: Let him answer the question.

A. No; not entirely.

Q. (By Mr. Powers): Who else would be hurrying?

A. The question of the operator of the machine who might not wait for a proper signal or might not take time to see that the person who gives him the signal remains in the clear.

Q. Well, suppose this crane engineer didn't take proper time. Whether you had an extra man there or not, if he isn't going to take proper time he would do it for one man just as well as another, wouldn't he?

Mr. Sims: It is argumentative. [110]

Mr. Powers: This is an expert, here, supposed to be telling the jury what——

The Court: I am going to overrule the objection. Let him answer.

Q. (By Mr. Powers): You blame it on the crane engineer, now?

A. The extra man there would be placed there

(Testimony of Ralph W. Peoples.)

to supervise the work. He would have certain responsibilities. Among them would be to see to it that truck drivers and others did not get in position where they would be endangered by the unloading of the logs and to give the signals, and the possibility of him giving a warning to the engineer if something was wrong, if someone was in a place where they shouldn't be.

Q. You think that second man might take more care of his own protection than the actual truck driver who is down there doing the work?

A. Yes, I think so.

Q. Why? What has been your experience with truck drivers that makes you say that?

A. Well, I find that on some occasions that they get in places where they shouldn't be and get hurt.

Q. Now, is it not the general practice in Oregon for the truck driver where he does his own, makes his load ready for dumping, to give the signal to the crane operator? A. Yes, I think so.

Q. And has it been your experience that no matter how many [111] precautions are taken a certain number of accidents happen, some accidents happen? Is that right?

A. It has been my experience with respect to log dumps that when they are equipped and operated as provided by the safety standards that accidents don't happen.

Q. Never? A. None to my knowledge.

Q. Never happen?

(Testimony of Ralph W. Peoples.)

A. Where they are operated in accordance with safety standards, yes.

Q. Yes. Well, I think perhaps you have in mind all the Safety Code provisions in that respect, do you not?      A. I have those.

Q. Yes. And by that you mean that if the safety provision here were followed that men shall not go between the brow log and the load of logs, this accident here could not have happened. Is that not a fact?

A. That is one of the factors that would have prevented it.

Q. It is a very important one, don't you think? (Pause.)

Mr. Powers: That is all.

### Redirect Examination

By Mr. Sims:

Q. If a truck driver gives a signal to the unloading engineer that "I am going in there to get my chain that is tied to the trailer——" [112]

Mr. Powers: There is no evidence of that, and now at this time I think the Court ought to admonish counsel or instruct the jury to disregard these statements of counsel. We have the depositions—they took the deposition—it is marked here as an exhibit—of Mr. Neal, Mr. Vincent, and Mr. Wood shortly after this accident occurred. There is not a word in that—when they first took this he said that the truck driver gave the signal at the time to unload the thing.

(Testimony of Ralph W. Peoples.)

Mr. Sims: Maybe I can assist counsel a little bit. There will be evidence in this case before this case goes to the jury that the signal that Mr. Neal indicated at the time of the taking of the deposition was a signal, a hand signal, that ordinarily means "I am going in there and get my chain. Hold everything." And if counsel would rather I excuse this witness——

Mr. Powers: I think he ought to have that witness before he asks any questions about it.

Mr. Sims: Very well. I will put Dorsey on and continue with this witness later.

The Court: Is that satisfactory to you?

Mr. Powers: Well, I would just as soon he would go ahead with this witness if he will say he will connect it up. We will get through with one and save time.

The Court: Go ahead. Repeat your question.

Q. (By Mr. Sims): If a hand signal is given by the truck driver [113] to indicate "hold everything. I am going in between the load and the brow log," wouldn't you say that under those circumstances the engineer would be on notice to wait and not to unload, and that that would make a difference as to the conduct of the truck driver?

A. I would say that certainly in those conditions that the engineer should hold it until he was signaled to go ahead.

Mr. Sims: That is all.



(Testimony of Ralph W. Peoples.)

Recross-Examination

By Mr. Powers:

Q. How would you give a signal? Now, let's see you give a signal. You are going in between a brow log and a load of logs. How do you give that signal?

A. The signal is normally used for holding.

Q. Well, you can explain this later.

Mr. Sims: Now, if the Court please——

Mr. Powers: No, this is cross-examination, and I should like to ask this witness, how are you going to give a signal? You are going in between a load and a brow log, and that was my question.

The Court: Answer the question if you can.

A. If I were to give such a signal, I would use both hands, the one hand moved in a horizontal position at or near the waist, and the other hand to point to myself and the position where I expected to go. [114]

Q. (By Mr. Powers): You think there is such a signal that you are going in between the load and the brow log?

A. If I were at the controls of a machine and someone gave me a signal as I have described, I would take it to mean that; yes, sir.

Q. But you have never seen such a signal given to mean that "I am going in between the load and the brow log," have you?

A. Not under those circumstances, no.

Mr. Powers: That is all.

(Testimony of Ralph W. Peoples.)

Redirect Examination

By Mr. Sims:

Q. What is the "Go ahead" signal, the unload signal?

A. Ordinarily the logging signal that is used everywhere for "Go ahead" on any main pulling line is the right hand raised and perhaps shook a little bit to indicate the motion.

Mr. Sims: That is all.

Mr. Powers: We think that last answer should be stricken. The witness here testified what kind of signal is given to unload, and now what is generally given couldn't have any bearing on this case. It is what they were giving down there, what Neal understood. It only confuses the jury, and we move it be stricken.

Mr. Babcock: If the Court please, that isn't quite an accurate statement of the record. The witness Neal testified that the driver gave a signal which he interpreted as a signal [115] to unload, but according to Neal's testimony on the stand was a signal with his body. Neal testified he apparently interpreted that to mean to unload, but this evidence has a further meaning to show that is not an accepted unloading signal.

The Court: Is the signal that you gave that one that is used generally in the logging industry and including Toledo, Oregon, at the C. D. Johnson Lumber Corporation plant?

A. Yes, sir.

The Court: Objection overruled.

(Testimony of Ralph W. Peoples.)

Mr. Powers: That is all we have.

Mr. Sims: That is all.

(Witness excused.)

Mr. Sims: There is one question I should ask.

The Court: Mr. Peoples, will you resume the stand?

RALPH W. PEOPLES

thereupon resumed the stand, and, having been previously sworn, testified further as follows:

Redirect Examination

By Mr. Sims:

Q. You were asked by counsel with reference to a signal from whoever was giving the signal to unload, and also with reference to the unloading engineer, keeping the man giving the signal within his observation. What would you say would be a safe practice and proper thing as to both the receiving of the signal and keeping his eyes open for men to see that they were [116] all in the clear?

Mr. Powers: He has been all over this; just invading the province of the jury.

The Court: Objection sustained.

Mr. Sims: Very well.

(Witness excused.) [117]

Mr. Sims: Mr. Dorsey Hutchens.

## DORSEY HUTCHENS

a witness produced in behalf of the plaintiff, thereupon resumed the stand, and, having been previously sworn, testified further as follows:

## Direct Examination

By Mr. Sims:

Q. Dorsey, what type of work do you do?

A. Well, log haul has been my work, and work in the woods. I have run unloading donkeys and loading donkeys.

Q. And for how many years have you done that type of work?

A. I started in 1934, and I have been at it pretty steady ever since.

Q. Were you present at the time Mr. Neal testified on deposition and testified yesterday?

A. Yes, I was.

Q. Are you familiar with the hand signals that are commonly used at the C. D. Johnson unloading dump and generally throughout this area?

A. Yes.

Q. What does the signal he showed and gave at the time of the deposition indicate?

Mr. Powers: The deposition will show that.

Mr. Sims: Why, the deposition won't show the motions.

Q. What signal did he give at the time of the taking of the deposition? [118]

Mr. Powers: We will object to that.

The Court: Why don't you confine it? The witness testified here. Is it a different signal?

(Testimony of Dorsey Hutchens.)

Mr. Sims: Yes; somewhat different, yes.

Mr. Powers: It was up to him to develop that with Mr. Neal. He has had that deposition here, if he found any inconsistency with it.

Mr. Sims: The deposition reads the same if my hand is up here saying "I will unload it," or down here (indicating). The printed page doesn't help us. I will be willing to confine it to just a signal of yesterday.

Q. What was the signal yesterday of Mr. Neal? What does that indicate?

A. I wouldn't say that it indicated unloading it. It was too low a signal even yesterday, and, besides, it was a side signal, which has nothing to do with an unloading signal. A "Go ahead" signal has always meant your right hand up in the air wiggling. Now, it always has ever since I have been in Oregon.

Q. What does a side signal indicate?

A. It means "Hold everything."

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Well, now, "Hold everything." You just don't mean to hold everything? You would have your hands flat, wouldn't you? [119]

A. Like this (illustrating).

Q. You would have your hands flat, would you not? Is that not the "Hold everything" signal, hold your hands flat?

(Testimony of Dorsey Hutchens.)

A. Flat, with them moving sideways.

Q. Yes; flat. Did you ever see—you say the signals given by Mr. Neal to go were wiggling his thumb even with his shoulder?

A. There isn't such a signal.

Q. Did you see him give it here in court?

A. I saw him give one sideways.

Mr. Powers: That is all.

The Court: That is all.

Mr. Sims: That is all.

(Witness excused.) [120]

Mr. Sims: Mr. Niles.

### RALPH H. NILES

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Niles, about how old are you?

A. Thirty-nine.

Q. And where did you go to school?

A. Reed College.

Q. And what have you done since you went to Reed College?

A. I have been working with life insurance companies in the actuarial departments.

Q. And are you in any particular department?

Mr. Powers: If he is an actuary, we will admit it as long as he says so.



(Testimony of Ralph H. Niles.)

A. I am assistant actuary.

Q. (By Mr. Sims): And how many years have you been an actuary?

Mr. Powers: We will admit his qualifications.

Mr. Sims: That isn't fair to the jury.

A. I have been assistant actuary for approximately three years in the Standard Insurance Company.

Q. (By Mr. Sims): When did you get out of college? A. 1934.

Mr. Powers: I don't think it makes any difference when he [121] got out of college.

The Court: Counsel has admitted his qualifications.

Q. (By Mr. Sims): What are the responsibilities of an actuary?

A. An actuary is responsible for determining the rate bases for insurance policies, for determining the premiums charged, dividends, surrender values, all calculations involved in life insurance company operations.

Q. In this particular matter our problem is this: A boy who is 21 years of age and whose wife is 23 years of age, and whose earnings are estimated at averaging \$3,000 annually—the record here shows an income tax for 1949 and it shows \$2127 for the first eight months of 1949, which—assuming that his rate didn't continue quite as good; in other words, say, dropping it down to \$3,000 a year—giving due regard for life expectancy of the widow and the boy who lost his life, and the earnings of

(Testimony of Ralph H. Niles.)

\$3,000—if a life insurance company was to pay a lump sum that would pay to her \$3,000 a year for her life expectancy, what would be the single premium paid to give her such an amount?

Mr. Powers: I doubt if that would be proper evidence, your Honor.

The Court: Well, Mr. Sims, there is no evidence here that she was going to get \$3,000 a year, even if her husband had continued to live.

Mr. Sims: That is true. [122]

The Court: And I don't think that that would be the proper measure of damages, based upon the full \$3,000 a year.

Mr. Sims: Well, the evidence shows that all of his money was being used, you might say, for family purposes.

The Court: He used some of it for himself.

Mr. Sims: That is right, and it cost him something to equip himself for food and clothing and medical and dental expense. I have that in mind, too. But my question of \$3,000—I felt it contemplated that because our record here shows \$2127 income in '49 from January to August. Now, probably his earnings—of course, he was only 21 years of age—would have increased. I realize that it isn't a mathematical and exact thing, and no one in the world could say that this lady would receive exactly \$1,500 benefit a year, or \$4,000 benefit. It is simply some evidence which I feel would be helpful.

The Court: Are you only assuming it on the

(Testimony of Ralph H. Niles.)

basis of \$3,000, or are you giving the witness—do you intend to ask him about other figures?

Mr. Sims: I was going to give other figures. I might interrupt my question——

Q. Mr. Niles, how many other figures did you use in arriving——

A. I can give it on the basis of \$1,000 and \$3,000. I could give testimony on the basis of \$1,000 and then any other yearly figure could be computed by simple multiplication.

Q. May I then modify my question upon the basis of \$1,000 a [123] year instead of \$3,000.

A. You want to know what a life insurance company would charge for a life annuity of \$1,000 a year for a woman aged 23?

Q. That is right. A. That is \$33,917.

Q. \$33,917? A. Yes.

Q. And as I understand you, that would increase or diminish according to the rate that it might be found that she would receive; that is to say, if it was upon the basis of \$500 a year it would be half that amount?

A. That is correct.

Q. If it is on the basis of \$3,000 a year it would be three times that amount? A. That is right.

Mr. Sims: You may cross-examine.

Mr. Powers: I have no questions.

The Court: Was that figured on the basis of a man who is 21 years of age?

A. No. That is a woman aged 23.

Mr. Sims: She is 23, your Honor.

(Testimony of Ralph H. Niles.)

The Court: I think that the only purpose of this question is to determine whether or not she had as great a life expectancy [126] as he did on the date of death of the decedent, and I think your answer is that she did; is that right?

A. I would say—based on the knowledge, I would say she had a greater life expectancy than he had.

Mr. Sims: That is all.

The Court: Any questions?

Mr. Powers: No.

(Witness excused.)

Mr. Sims: May we have just a moment? I think the plaintiff rests.

Mr. Babcock: Plaintiff rests, your Honor.

The Court: One second before you rest. Are you of the opinion that you introduced all the exhibits you proposed to introduce?

Mr. Sims: We have introduced the photographs, the income tax records——

The Court: What?

Mr. Sims: Oh, the safety codes that I believe your Honor marked as exhibits should go in.

The Court: Nothing has been offered except the photographs. That is Exhibits 2 to 14, inclusive.

Mr. Sims: The income tax records, I believe, if your Honor will review his notes, were received without objection. I asked the Court if we might

read that at the time of argument, [127] and that was allowed by the Court.

The Court: Do you have them here?

Mr. Sims: Yes, they are here. The clerk has them.

The Court: It is 19 and 20?

Mr. Sims: That's right.

The Court: 19 and 20 admitted.

Mr. Sims: 15 and 16, there was a duplication as to that. Mr. Powers stipulated as to 15 and 16.

The Court: The funeral and burial expenses, the amount was stipulated at what figure—nine hundred and some dollars? You didn't have the exact figures.

Mr. Sims: \$974.71, the stipulation is.

The Court: \$974.71?

Mr. Sims: Right.

The Court: Have you examined the documents which support it, Mr. Powers?

Mr. Powers: No, but I told them I would take their word for it. I think they meant it.

Mr. Sims: Well, if you would like to see these——

The Court: Have you already stipulated——

Mr. Powers: I stipulated—I said if they would say that is what it cost them for funeral expenses I would stipulate it. I said if counsel would say it.

Mr. Sims: Here are the bills. Perhaps we had better offer them in evidence. [128]

Mr. Powers: We will stipulate as to it.

The Court: \$974.71 is the stipulated amount

that plaintiff has incurred in connection with the burial expenses.

Mr. Sims: And that this amount is the reasonable amount.

Mr. Powers: Yes; as they testified.

Mr. Sims: Now, the Safety Code was marked as 17 and 18. We want to offer those in evidence at this time.

The Court: Any objection, Mr. Powers?

Mr. Powers: No, I wouldn't object to the offering.

The Court: 17 and 18 are admitted.

(The pamphlets, so offered and received, were thereupon designated as follows: "Safety Code for Sawmill, Woodworking and Allied Industries of Oregon" as Plaintiff's Exhibit 17; and "Logging Safety Code" as Plaintiff's Exhibit 18.)

The Court: Is that all?

Mr. Sims: I think that is all, your Honor.

The Court: And plaintiff rests.

Mr. Powers: Do you want to proceed now outside the presence of the jury? It doesn't matter. We have a motion, your Honor.

The Court: You have a motion?

Have you a short witness that you can put on now?

Mr. Powers: Yes, if the Court wants to hear him without waiving our motion.

The Court: It is a quater of twelve. How long do you think it is going to take you to put on your case? [129]



Mr. Powers: Just a very short time, your Honor.

The Court: A very short time?

Mr. Powers: Yes.

The Court: Are you in a position to argue the case this afternoon?

Mr. Powers: I would be.

The Court: We will excuse the jury until 2:00 o'clock.

(Thereupon the jury was excused until 2:00 o'clock p.m. of this day, Wednesday, June 21, 1950, and the following occurred without the presence of the jury.)

Mr. Powers: Comes now the C. D. Johnson Lumber Corporation and moves the Court for an involuntary nonsuit on the grounds and for the reason that there is no evidence in this case to support a violation of the Employers' Liability Act of the State of Oregon. There is no evidence on which the jury could return a verdict of a violation, so we submit to your Honor that we are entitled to a nonsuit at this time, and in that connection I will call your Honor's attention to the recent authorities which have held that a man, where he is responsible for making his own working conditions, is not entitled to the protection of the Act if he fails to take a safe position if there is one open to him. We further call your Honor's attention to the undisputed evidence in this case that the deceased was the one in charge of the truck and the fastening of the chains [130] and un-

fastening of the chains and making it ready for the unloading, and through no stretch of the imagination could it be argued or could a jury of reasonable-minded persons find from anything in this case that there was any defect in any of the equipment or machinery of the C. D. Johnson Lumber Corporation.

Now, the Employers' Liability Act is designed to impose upon employers a standard of care with respect to the equipment and machinery and operation carried on. It is not designed and it has never been so held to apply to what would be common law negligence of some individual working for that employer. It is obvious when an accident occurs through some faulty machinery, equipment, or arrangement, that the Employers' Liability Act applies, and not such as this would be the situation here. Now, the only evidence in this case is—and that is the evidence of the plaintiff. The plaintiff subpoenaed these witnesses, and, in my opinion, your Honor, when you refer to adverse witnesses, these witnesses were not adverse witnesses. They were not made adverse witnesses under the statute by counsel. Those witnesses, then, the testimony of the plaintiff, is that the crane engineer got a signal from the deceased to unload. In abundance of caution he asked the other man to check on the pond, too. Where, then, is there any evidence of negligence? At most, there might be some kind of an inference, but you cannot base an inference on an inference. [131] Under the undisputed evidence in this case, there was no vio-

lation of the Employers' Liability Act, and, in fact, there was no negligence on the part of the engineer. There is no evidence contradicting it, not a word. I would like to have counsel point out, then—where is the violation of the Employers' Liability Act?

Now, in that respect, I should like to refer your Honor to the pre-trial order and see what they claim. Invariably in these cases there is set forth what could have been done that would have made the operation without impairing the efficiency, safer. Now, what do we find? We find their first specification of negligence is a violation.

The Court: On page 8?

Mr. Powers: Yes; thank you; a violation of the Safety Code for sawmills.

Now, the evidence in this case indicates clearly there was no sawmill operation actually involved, that the logs were being delivered and logs were being rafted; they were not sent into any sawmill. After they got down here they were put in boom sticks 65 feet long and towed to wherever they might have to go. We submit as a matter of law there is no sawmill involved, but we submit the more critical point with respect to that charge of negligence that the Employers' Liability Act sets forth the standard of care. You cannot go out and take some other law and even draft that law onto [132] the Employers' Liability Act, and they cannot enlarge upon the Employers' Liability Act by picking out some other law which a violation—would be a common law, perhaps, but certainly

there is no requirement in the Employers' Liability Act that anyone specifically complied with that law, so we say that that is—they could never recover under the Employers' Liability Act for violation of some other law. Under the Employers' Liability Act, the defendant is stripped of his common-law defenses. Under that other act he is not stripped of his common-law defenses. You can see where we would be getting to—a violation of a sawmill code. In the first place, a sawmill is not mixed up in it; and, in the second place, a violation of some other law would not be a violation of the Employers' Liability Act; so we submit that there is no basis for recovery under 1.

Now, in failing to require that all signals for the unloading of logs should be given from a single designated person, there is no evidence from which the jury could find that there was anything here other than the designated person who was the truck driver. A designated person, here, was the truck driver. That is what all the testimony is. There is no evidence that it would be any safer anyway. The evidence, as a matter of fact, indicates that where there is just one truck it is just as safe for the truck driver to give it as anyone else, and probably safer than to have two men around; [133] and, furthermore, that that is the general practice in Oregon.

Now, the Employers' Liability Act was not designed to make up these far-reaching theories, certainly, to maintain an action. If there is a breach of the common law they have an action at common law where there is a limit of liability of \$15,000,

or if he was an employee, as they claim of Francis, he has his claim against—if they could make that stick, under the Workmen's Compensation Act.

Now, with respect to No. 3, in failing to provide a sufficient number of workmen. Well, now, where there is one truck involved, the expert said it would be the ordinary practice and a safe practice to have the truck driver give the signal.

Now, in 4, there, they go back to the provisions of the Logging Safety Code. The Logging Safety Code would have some application, because that is what they were actually engaged in, but a violation of that logging code could not be engrafted onto the Employers' Liability Act, we submit, your Honor, and no recovery could be made under the Employers' Liability Act for the violation of some other law, and, furthermore, there is no evidence that there was any violation of the logging code on the part of this defendant.

Now, with respect to 5, in causing the log to be unloaded from the truck without notice or warning to the decedent and in violation of Section 612 of the Sawmill [134] Code—well, the sawmill code is not involved and the only evidence involved here is that the decedent, himself, gave the signal to unload it.

Now, No. 6—in failing to provide the unloading machine with an audible warning device and in failing to sound an audible warning device. Well, it is admitted and the expert so testified that a visual inspection is better than any audible device



anyway, to look and actually see rather than just to blow a whistle and do something.

7, in failing to have stationed at the unloading dock an additional employee. Well, there is no evidence to support that, that it would be a violation of the Employers' Liability Act. That is a repetition of the one I discussed above.

Now, we have 8, the sawmill safety code, again. That just cannot be engraved upon the Employers' Liability Act to make out a case. There is no basis there.

No. 9, in giving the signal to unload the log and in causing it to be unloaded at a time when its agents knew, or by the exercise of due care should have seen, the decedent in a place of danger. There is no evidence that they knew he was back in there or would have any reason to know he was back in there, and the evidence is that the only signal other than the decedent's signal was the one that the pond was clear, and in connection with this last specification, the testimony [135] is entitled to the presumption that the decedent would be in the exercise of ordinary care, and that the decedent would not violate the Code provision and place himself in a position between the truck and the brow log. There is that presumption, and there is no evidence to overcome that, and we had a right to rely that he wouldn't do that, and, as the testimony shows, if he got back in there nobody could see him, so we submit that under none of their specifications are they entitled to have this case go to the jury



on any claimed violation of the Employers' Liability Act.

The Court: Mr. Powers, I want to get your position clear.

Mr. Powers: Yes.

The Court: Are you contending that in order for one to come within the provisions of the Employers' Liability Act it is necessary that he prove that there was a defect of a mechanism or equipment? I thought you were making that argument, that if there is negligence of a fellow employee that that is not sufficient.

Mr. Powers: I make this point: That it is not sufficient to show a violation of the Act that there is a human failure. There has got to be—and it applies only in cases where there is some unprotected machinery, apparatus, or device which is used in connection with carrying out the work or the operation. The mere fact that an employee does something is not sufficient. The mere fact that an employee would do [136] something—in other words, the legislature never had in mind saying to an employer, “Now, look, you. If you get some employee down here that commits a negligent act we are going to take all your defenses away from you.” No, what they are saying is an outgrowth of the old factory act. It says what you must do, and the first section says what you shall do where certain appliances—the first part of this Act relates and specifies the appliances and equipment, and so on, that an employer must have. That is the specific part of the Act. Now, there is the

“and generally” part, and that relates and is carried through to mean some device, some machinery, some such equipment used in the work that you could protect a workingman against such as a safety guard over a saw. It does not mean an individual employee. How could an employer ever be said to be guilty of a violation of the Act because one man might be better than another? How could you protect yourself? You just couldn’t, and the Act doesn’t apply to that type of situation.

And we move for a non-suit on the further ground that it appears affirmatively from the evidence that the deceased was the one that was actively in charge of the equipment of the truck and the chain and the bunk blocks, and the only things that might possibly be said to have been negligently attached or defective in some way. There might be some inference there was something wrong with that equipment, and, [137] on the other hand, there is no evidence that there was anything wrong with ours, with this defendant’s, here; and on the further ground that it was the deceased, himself, who made his own working conditions, and that there was a safe place to go, and that it appears that he got into a place where he is forbidden to go by law.

So under those circumstances we submit to your Honor we are entitled to a judgment of involuntary non-suit.

Mr. Babcock: If the Court please, taking Mr. Powers’ points in order, the first being that the evidence shows that the decedent was in charge of

the operation, presumably that ground for his motion is based on such cases as *Robin vs. Erwin*, where the head faller was injured. The evidence conclusively shows in this case that the decedent was not in charge of the operation, that he simply performed certain menial tasks in connection with the unloading of the logs, that the unloading engineer——

The Court: I think it might be a question we should submit to a jury, but it certainly is not a question that——

Mr. Babcock: At the best, I would submit that it is a question for the jury, and in our view of the evidence as it stands now, the evidence is conclusive on the point that it was the defendant who was the owner and in charge of the work and specifically it was the engineer who was the supervisor or employee of the defendant and was in charge, and he was the [138] one who applied the power and controlled the application of the power and energy to move the log.

With respect to the second point, namely, that there must be a defect in machinery or in physical property shown, that is certainly a new one to me, because the cases have been proceeding on the other theory for a great many years. The Act, itself, provides that the employer or owner is responsible for the acts of the person in charge of the work or the particular part of the work involved. It also provides that the fellow servant defense is no longer available, and if the Court deems it necessary I think we can go through the

cases and find case after case where the accident was the result of the mistake, inadvertence, or negligence of some other employee or supervisor.

The Court: That has been my opinion, Mr. Powers, all along, and I was quite surprised when this contention was advanced. None of the cases which you have cited seem to bear out that contention, Mr. Powers.

Mr. Powers: Well, I feel that they all bear it out, your Honor. It is a reading of the cases—the Ninth Circuit Court of Appeals, Smith against Shevlin-Hixon. Now, there was a woman that had to get up and down, jump down in a thing, and the Circuit Court of Appeals points out that our argument here, that this thing was so close to where she actually had to work, she was carrying on her work where she had to be and [139] jumping down—having an apparatus where she had to jump—they thought might be a violation of it. But now here is what your Honor is faced with in this case. Are you going to say that an employer is in violation of the Act where some employee has gone in violation of the law into a position of danger, where he is not allowed to go by law, where, under the evidence, there is a safe place for him? Now, if you read that Robin case, the one I just talked about, you will see what the Supreme Court of Oregon has said. If you read also that case where a log rolled off on a man and killed him, it is the same way. It is a stronger case where a non-suit was granted.

The Court: Well, in the absence of some au-

thority to the effect that when a man is working in a place of danger or in a hazardous occupation and at a place of hazard, even though he may be injured by the negligence of a fellow servant, he may not recover under the Employers' Liability Act—in the absence of such a case I am going to overrule that particular request. If you have such a case, Mr. Powers, I wish you would submit it to me sometime this afternoon, because I think you are correct, here, in your statement that the plaintiff has not shown any defect of equipment here.

Mr. Babcock. We haven't claimed it.

The Court: No. I appreciate that.

Mr. Powers: I don't know if your Honor has read the case [140] of Jackson vs. Oregon Lumber, 152 Or. I think that those situations are similar. I should like to call your Honor's attention to Perreti against the Southern Pacific, which is right in this Court.

Mr. Sims: Well, the Shevlin-Hixon case, the Galina Smith case, there was no claim of defective machinery or equipment, and in that case the Circuit Court of Appeals made it abundantly clear, I thought, that it was simply a question of whether every care, device, and precaution was taken, and the fellow servant negligence goes right to the very heart of that problem, here. The engineer said that he didn't know where Dean Hutchens was when he unloaded, since he could have looked again but didn't; so that surely would carry it to the jury. Now, was every care—we are talking



about care, not device, now, just care—taken? What is meant by “care”? Just a glance, the slightest turn of his head or rolling of his eyes and this fatal accident would not have occurred. That is the state of this record. The Act, itself——

The Court: What is the third point, Mr. Babcock?

Mr. Babcock: His third main point was that there was no evidence to support the specifications of negligence.

The Court: There is evidence. Mr. Peoples testified as an expert that they should have taken certain precautions, and then apparently there is a conflict in the evidence as to what the deceased did, as to whether he waved his finger in [141] one position or in another position.

Mr. Powers: Where would the conflict come from? There was only one witness. The other witness said what he saw here in court, and I would like the reporter to get that transcribed for your Honor. He said he gave the highball signal to unload.

Mr. Babcock: He did not, your Honor. I watched him particularly, observed in the deposition. The signal was not an overhead signal.

Mr. Powers: I wasn't there when the deposition was taken, but it is indicated it was a signal to unload.

Mr. Babcock: The jury observed the signal on the stand.

The Court: I didn't see—there are two witnesses, Mr. Powers, to the effect that the “Go



ahead'' signal is an overhead signal, waving the finger above the head, the right hand, and the witnesses who testified earlier testified that he had given a different kind of a signal.

Mr. Babcock: It was more like this (illustrating).

Mr. Powers: Will you get that out, Glenn?

Mr. Sims: The witness Neal waves his thumb about waist-high, and Mr. Neal did not raise his hand above his shoulder or his head.

Mr. Babcock: Mr. Neal testified and nodded that he gave his signal with his hand, and it wasn't as Mr. Powers has suggested. But at any rate the jury observed that. [142]

Mr. Powers: Will you agree with me that he stated he gave a signal to go ahead and unload?

Mr. Babcock: Something to that effect. In any event, Neal's testimony was to the effect that he so understood the signal. That is true. We would like to make this observation with respect to the application of the Safety Code. Mr. Powers has stated the sawmill safety code has no application, which certainly I cannot agree with. This pond was operated in connection with a sawmill.

Mr. Powers: No, it wasn't. There is no evidence to that effect.

Mr. Babcock: It is stated right in the agreement with the agreed statement of facts.

Mr. Powers: We agree that the defendant operated a sawmill, but not that this——

Mr. Babcock: In connection with its sawmill, the defendant operated a log and loading dump on the Yaquina River.

Mr. Powers: That's right; not as a part.

Mr. Babcock: In connection with. All log dumps are operated in connection with a sawmill. Now, the fact is, your Honor, that you will find by comparing the codes that the logging code which was the earlier code covered log unloading, as also did the sawmill code, which is a later code, and to a large extent the provisions are identical.

Mr. Powers: In the sawmill code they have added a few [143] additional provisions, and in the pre-trial order and our contentions, we have referred to both, and where they were the same we have alleged both, and both the log and sawmill, logging and sawmill, safety codes govern this type of an operation, and they make it quite clear, both of them. They contain the express provisions, that all men shall be in the clear when the logs are dumped. The sawmill code contains an additional phrase and a signal given before logs are dumped. Now, I don't think it is necessary for me to go into great detail, because I think quite clearly that there is evidence supporting each and every specification of negligence that we have charged in the pre-trial order.

The Court: I will deny the motion for an involuntary nonsuit or dismissal.

Mr. Powers: Exception, please.

The Court: We will now adjourn until 2:00 o'clock, but before we do I want to again ask—Mr. Powers, do you think your case will take two hours to put on?

Mr. Powers: No, I don't.

The Court: An hour?

Mr. Powers: An hour or hour and a half, depending on how long they cross-examine.

The Court: And do you want to argue the case this afternoon and instruct tomorrow morning?

Mr. Powers: I prefer to instruct tonight. [144]

The Court: You gave me your instructions less than a half hour ago.

Mr. Powers: They are just common ordinary instructions. Of course, I went on the basis you had to finish tonight.

The Court: Yesterday I told you——

Mr. Powers: And I have something set in another court.

Mr. Sims: The Court told us yesterday we did not have to finish today, and the Court said definitely the Court would instruct in the morning.

Mr. Powers: The Court said that, but I am telling what I did. I set a motion tomorrow morning, because I thought we would get through, that can't ride over. I think we can reach the point, and I am shortening up my case so we can get through today if possible.

The Court: Off the record.

(Discussion off the record.)

Mr. Sims: I certainly hope the Court does instruct in the morning, because I always feel that to give a case to a jury in Federal Court late in the afternoon is an invitation to a disagreement, and we haven't had the benefit of counsel's——

The Court: Do you propose to argue the case this afternoon?

Mr. Sims: Yes; I assume we can do that this afternoon, assuming he will get through in an hour or so.

The Court: Adjourn until 2:00 o'clock.

(Thereupon a recess was taken until this afternoon, Wednesday, June 21, 1950, at which time the following further proceedings were had herein:) [145]

Mr. Powers: Are you ready to proceed, your Honor?

The Court: Oh, yes.

Mr. Powers: We will call Mr. Calavan, please.

### DELWIN CALAVAN

was thereupon produced as a witness in behalf of the defendant, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Powers:

Q. State your name for the jury, please.

A. I am Delwin M. Calavan, commonly known as Mac Calavan.

Q. And where do you live, Mr. Calavan?

A. Toledo, Oregon.

Q. And you have been a resident of Oregon for how long?

A. All my life.

Q. And you are how old?

A. Thirty-four years.

(Testimony of Delwin Calavan.)

Q. And how long have you been in the logging work?      A. Continuously since 1934.

Q. Now, you have been in it continuously, then, for a period of sixteen years?      A. Yes.

Q. Where are you employed now? Where do you work?

A. I work for the C. D. Johnson Lumber Corporation.

Q. And what is your work? What are your duties there?

A. I am chief scaler and directly in charge of all water [146] operations of the C. D. Johnson Lumber Corporation—in other words, supervisory boom foreman.

Q. Now, what other experience have you had in the logging business? What did you start doing when you went in the logging business?

A. I started in the logging business in 1934 as a cat driver and bulldozer.

Q. Working in the woods, then?

A. Working in the woods.

Q. And you worked in the woods for some time?

A. I worked two years on this particular job, and at that time I also did the high-climbing.

Q. You did high-climbing?

A. That's correct.

Q. What is high-climbing? What does that mean?

A. That is the—the high-climber is the man that goes up and tops the tree before the rigging is put in for rigging up for logging.

(Testimony of Delwin Calavan.)

Q. In addition to high-climbing and running the cat, what else have you done in the logging business?

A. I have run a tugboat, scaled logs, drove log truck, and worked in supervisory capacities.

Q. And you say you have worked as a truck driver, driven log trucks? A. I have. [147]

Q. Now, when are the logs scaled that are delivered in the river, there, such as the logs we are talking about here from Francis?

A. May I ask a question there? For payment?

Q. I don't know about the payment, but I mean when do you count up the logs that are sent in or that you get from Francis under that contract?

A. When they are in the raft.

Q. I see. And how do you know which logs he has brought in?

A. He has a brand which is registered on them.

Q. And who counts those logs and figures out the number of feet?

A. I, myself, make the calculations as to the amount of lumber there are in the logs.

Q. In other words, that is the job of the scaler?

A. That's correct.

Q. And you are the chief scaler?

A. That's correct.

Q. Now, on the logs that are brought in, is there any count made of them under that contract until they are scaled, as you are talking about?

A. After they are brought in? No.

Q. Well, they are never counted by C. D. John-



(Testimony of Delwin Calavan.)

son Lumber Company—I will ask you: Are they counted by C. D. Johnson Lumber Company up until the time they are scaled in the water? [148]

A. No.

Q. And under the contract these logs were to be delivered where?

Mr. Sims: I don't get the materiality of this, your Honor, how it could be helpful to the jury on the question of negligence or contributory negligence, but I don't see where we are going. I wonder if counsel could help us. It is interesting to go into how they scale and when they pay and all that, but does it help here? It is not a matter of issue here.

The Court: Mr. Powers, I think this is the first time it has come up, actually, but I have already indicated how I am going to rule, and therefore I will sustain the objection. I can't see the materiality.

Mr. Powers: I would like to make an offer of proof. I can't see any harm in making it at this time and before the jury. I mean I will ask the witness a question and——

Mr. Sims: Well, that is a little unusual. Any business has its problems. I would be glad to step with counsel in chambers if he likes.

The Court: I think that would be the better procedure. You ask some other questions, and then we will take the offer of proof at a later time.

Q. (By Mr. Powers): Where is the logger to

(Testimony of Delwin Calavan.)

deliver the logs? Where must he deliver the logs to the C. D. Johnson Lumber Company?

A. In the water. [149]

Mr. Sims: Of course, that is the same objection. I move it be stricken. It is calling for a conclusion. It doesn't conform to the record in this case, and it is not an issue.

The Court: I don't know whether it is that, but I am going to sustain the objection, and the jury is instructed to disregard the answer.

Mr. Powers: I don't believe I followed the basis of his objection being sustained. What is the basis of it?

The Court: Well, I think we argued that out before, Mr. Powers. I know your contention of independent contractorship, and I don't think it has any applicability here.

Mr. Powers: Well, what I want to get at is, are we estopped from showing what the logger was to do, where he was to make the delivery?

The Court: I think the only question is whether or not they were engaged in a common enterprise and whether or not the plaintiff's decedent was on the premises lawfully, and as long as that is shown I think the Act would apply.

Mr. Powers: How else can I show it?

Mr. Sims: Counsel has admitted he was there lawfully.

The Court: Are you contending plaintiff's decedent was on the premises unlawfully, or was a trespasser?

(Testimony of Delwin Calavan.)

Mr. Powers: I am asking the Court if the Court doesn't want me to show where the logger was to deliver the log. That would bring him on the premises so he could put it in the water, [150] and I so stipulated the other day, that he had a contractual right to come upon the premises, and that is as far as my stipulation went. There is no evidence yet as to whether he was an employee, contractor, or what he was.

The Court: Go ahead. I don't see the materiality, but I just——

Mr. Powers: Yes.

Well, then, he answered that the logger delivers it in the water, and I understood the Court to have stricken that.

The Court: That's right. Ask him the other question.

Mr. Powers: Which one is that, your Honor?

The Court: You can ask the question over again.

Q. (By Mr. Powers): Where, under the arrangement, there, was the logger to deliver the logs?

The Court: That is not the question. I am going to sustain that. If you want to make an offer of proof you can make it at this time.

Mr. Powers: If the court reporter will read the other question you had in mind, then I will ask it again, whatever it was. I thought that was the one you wanted asked.

(The question referred to was read as follows: "Question: Where is the logger to deliver

(Testimony of Delwin Calavan.)

the logs? Where must he deliver the logs to the C. D. Johnson Lumber Company?")

Q. (By Mr. Powers): I will ask, where was the logger supposed [151] to deliver the logs?

A. In the water at Toledo.

The Court: Go ahead.

Q. (By Mr. Powers): Are you familiar with the Logging Safety Code? A. I am.

Q. And what is the general practice as to who gives the signal to the unloading engineer in a logging operation of this nature?

Mr. Sims: Now, the general practice, of course, would not make any difference and wouldn't be any defense. The Employers' Liability Law requires the employer to use every care, device, and precaution. That duty is continuing and cannot be delegated to any——

The Court: That's right, Mr. Powers. If you want to ask him what happened over here it is all right.

Mr. Powers: Well, they were talking about what was good practice, and I should think that one measure would be the general practice.

The Court: What the general practice is doesn't affect the question of whether or not C. D. Johnson Lumber Company complied with the Act.

Q. (By Mr. Powers): Have you been around the other logging operations to any degree at all?

A. Yes; considerably.

Q. Have you ever found any place that had an

(Testimony of Delwin Calavan.)

extra man to give [152] a signal other than the truck driver in an unloading operation in any of the other operations?

Mr. Sims: Just a moment.

The Court: Objection sustained.

Q. (By Mr. Powers): Well, I will ask you, then, now, in your experience would another man under the circumstances that we had present here be of any help or make it any safer to give a signal to the crane engineer other than the truck driver?

A. No.

Q. Mr. Calavan, when did you first hear of this accident?

A. I heard them blow the whistle on the donkey that there had been an accident.

Q. I see. Where were you then?

A. Approximately, oh, approximately 300 yards. I was in the C. D. Johnson office.

Q. And what did you do?

A. Well, as I remember——

Q. I mean, what did you do with respect to going down to where the accident occurred?

A. I went out there.

Q. Immediately, or how soon?

A. Immediately.

Q. Did you hurry?

A. To a certain extent, yes.

Q. Now, you got to the scene of the accident about how long [153] after it happened?

A. I would say three minutes.

(Testimony of Delwin Calavan.)

Q. Did you make some investigation there?

A. Yes, I did.

Q. And can you state to the jury whether there were any binder chains on the truck or around on the ground, there?

A. There were two binder chains in the jockey box, as I remember, on the back of the truck where they had been thrown when the truck driver readies himself for the unloading.

Q. Now, let's see—where is the jockey box on the truck?

A. Directly behind the cab of the truck, and the frame that the trailer tongue sits into.

Q. You found no binder chains on the ground at all? A. None.

Q. They were in the jockey box. What about the truck, itself? Had the bunk chains been released for unloading? A. They had.

Q. Now, will you state to the jury whether a bunk block can be released, or on this truck could be released, from the opposite side of the brow log?

A. It could. It was a regular logging truck, International and green in color.

Q. In the unloading operation there, is there anything in connection with the driver's work that would require him to go between a load and the brow log? [154] A. No, there isn't.

Q. You heard the testimony of Mr. Neal as to the position that the driver was in when he gave the signal to Mr. Neal. How far was the driver,



(Testimony of Delwin Calavan.)

approximately, from the position he was in to where the crane engineer was?

Mr. Sims: Well, now, just a moment.

Would you read that question, please?

(Last question read.)

Mr. Sims: Well, if he knows, that is all right.

A. That would be a distance of approximately 30 feet.

Q. (By Mr. Powers): And this particular log that was unloaded that day that has been described, do you know the size of it, the length of it?

A. I do.

Q. Did you scale it? A. I did.

Q. How long was that log?

A. That log was 40 feet long.

Q. 40 feet long. Now, who, in connection with the unloading operations, makes the truck and load ready for unloading? A. The truck driver.

Q. Are there any employees of the C. D. Johnson Lumber Company that assist in what the truck driver is doing at the truck?

A. No, there are not.

Q. Does the crane engineer ever leave—does the crane engineer, [155] in connection with this type of operation, ever leave the seat, or wherever he is operating the crane?

A. Not at the time the trucks are to be unloaded, no.

Q. There is not, then, an intermingling of any employees of the C. D. Johnson Lumber Company

(Testimony of Delwin Calavan.)

and the truck driver and what the truck driver is doing. Is that correct?

Mr. Babcock: Your Honor, we object to that. It calls for a conclusion and opinion, and I think the facts are in evidence.

The Court: Objection sustained.

Q. (By Mr. Powers): Does the crane operator attempt to give any—show the truck driver how he should get the truck ready for unloading, or is that up to the truck driver?

A. The only thing that the crane operator does is give him a signal when he stops where to stop his truck.

Q. As far as getting the chains loose, the bunk blocks out of the way, and the loading line around the log, and the giving of the signal, that is up to the truck driver working by himself. Is that correct? A. It is.

Q. Now, the particular brow log that was involved in this accident, how long has that log been there? A. Approximately two years.

Q. And the one next to it, that is the last one to the south. Is that correct?

A. The one that the truck was at at the time of the death has [156] been there about two years.

Q. Yes. And then you have three there altogether, have you not? A. We have three.

Q. And how about the one next to it, the one in the middle? How long has that been there?

A. That was replaced after I went to work for C. D. Johnson.

(Testimony of Delwin Calavan.)

Q. How long ago was that?

A. That was five years ago June the 18th.

Q. Mr. Peoples, who testified here this morning—are you acquainted with him or any position he occupied while he was in Oregon other than what he stated?

A. I have heard the name and have met the man, yes.

Q. Did you meet him in any capacity of the business agent or representative of the CIO?

Mr. Sims: Now, if the Court please, I don't know how that could possibly be made material. It could only be asked for the sake of attempting to raise some prejudice. It was not gone into in any way with the witness, and, regardless of what the answer is, it couldn't make any difference here, could serve no legitimate purpose, whether he belongs to one union or another union or no union.

The Court: Objection sustained.

Mr. Powers: He testified what his activities had been. I don't know as it makes any particular difference, but that [157] is what I understand to be the case.

Q. Now, Mr. Calavan, the deceased had been coming into the unloading dock there for a period of about how long?

A. Mr. Francis started logging, as I remember, in June, and, not having been personally acquainted with Mr. Hutchens, I could not say the exact amount of time. However, this was in August.

(Testimony of Delwin Calavan.)

Q. So this was some two months after Francis had started hauling. Is that correct?

A. That's correct.

Q. Now, Mr. Neal, he has worked there ever since you have been there, has he?

A. Mr. Neal was there when I took this job, yes.

Q. And have you had any experience in operating a crane? A. I have.

Q. You know how to operate a crane?

A. I can run that one.

Q. Now, Mr. Neal, in his experience—you are in a supervisory capacity—his experience as a crane operator was what?

A. Well, all I can say is as a crane operator he was there when I came, and he has been on it ever since, listed as donkey engineer.

Q. Do you know whether he knows whether a signal is one to unload or not?

A. He knows. [158]

Q. And how has Mr. Neal been in the operation of the crane as being a careful operator or otherwise?

Mr. Sims: I don't see how that could be material.

The Court: Objection sustained.

Mr. Powers: He works for this man in a supervisory capacity.

The Court: Did you see him at the time this log was unloaded?

A. Did I see Mr. Neal at that time? I was there about three minutes after the accident.

(Testimony of Delwin Calavan.)

The Court: You didn't see the unloading of that log?

A. I didn't see the unloading of that log. I was working at my desk.

The Court: Objection sustained.

Q. (By Mr. Powers): Immediately after the accident, did Mr. Neal state to you anything about——

Mr. Sims: Now——

Mr. Powers: Just a minute, please.

Q. ——about how the accident happened, what signals, if anything, had been given?

The Court: Objection sustained.

Mr. Powers: Part of the *res gestae*, within three minutes after an accident happens when a death is involved, certainly——

The Court: Objection sustained.

Q. (By Mr. Powers): And you were there for the purpose of investigating into any part of the accident?

Mr. Sims: I object to these leading questions. This is [159] a Company representative, and counsel is giving him the answers.

Mr. Powers: I am asking if he was there to investigate it.

The Court: You may ask the question if he was there to investigate.

The Witness: Would the reporter read the question?

Mr. Powers: I will ask the question.

(Testimony of Delwin Calavan.)

Q. Were you there to investigate into the accident to see what had happened?

A. I knew that someone had been hurt, and I was there to see what could be done, yes.

Q. And Neal made a report or statement to you as to what happened. Is that correct?

A. Mr. Neal and Mr. Vincent, both.

Q. And you accepted that in the regular course of employment, there, as their supervisor?

A. I did.

Mr. Powers: I assume the Court wants us to make an offer of proof as a part of the res gestae——

Q. And you didn't ask them any questions, and you could have then——

The Court: Are you trying to impeach their testimony?

Mr. Powers: No. I am just trying to show this is what was stated at the time.

The Court: Objection sustained. [160]

Q. (By Mr. Powers): In the work that the deceased Hutchens was doing, did you or anyone else try to tell him how to get his load ready for unloading?

Mr. Sims: He has already asked that and it has already been answered.

The Court: Let him answer again.

A. I did not know Mr. Hutchens.

Q. (By Mr. Powers): In the operation, there, does the crane engineer take any part in that, to



(Testimony of Delwin Calavan.)

try to tell him how to get his load ready for unloading?       A. No, he does not.

Q. That is solely up to the driver. Is that correct?       A. That's correct.

Mr. Powers: I think that is all.

Mr. Sims: May I have the pictures marked at the time of pre-trial by the defendant?

Mr. Powers: While he is getting those marked, I will just ask you one or two other questions, then.

Q. There is some contention about a whistle, here. I think it has been completely covered. In the period of your experience, there, would it be safer to blow a whistle instead of making a visual inspection, looking with your eyes to see if things are clear?

A. In my experience with logging, the only time they use a whistle is the time when they cannot see the men. Out in the [161] woods, for instance, they use a whistle punk to blow a whistle, because the man on the yarder may be 1200 feet away from those men, and they have to have a whistle in order to know when to go and stop.

Q. Now, in your operation, there, where you require them to look and see the pond man is out of the way, do you feel that is less safe or safer than using a whistle?

A. I feel it is much safer than using a whistle.

Q. Oh, one other thing. In connection with the safety of the operation, there, is there anything about your crane line that is a safety factor as far as not requiring the man to go and unhook it?

(Testimony of Delwin Calavan.)

A. On our crane line, there, the hook—you know as they——

Mr. Sims: Just a minute. I don't know where this leads us, either. This isn't a claim of negligence or a claim of contributory negligence, and it doesn't go to any issue, here, as to the type of catch that was used. If it could be helpful in any way—it has not been gone into by any of us at any of our pre-trial conferences or in opening statements, so I don't see quite the purpose of it.

The Court: What do you claim for it, Mr. Powers?

Mr. Powers: I claim it goes to the safety of the operation. Well, in order to explain it I would have to say what the witness was going to say, and I had better not do that.

The Court: To what specification are you referring now? [162]

Mr. Powers: Well, there is this thing about it: The Court has in mind intermingling, and we have showed the testimony shows that the driver is the one that makes all the arrangements for getting a truck ready to be unloaded. Now, I was just going to carry through and develop the point that after the log is off they have a safety device there that I think the cable disconnects itself automatically some way, so never is any employee of C. D. Johnson down around this operation. I just want to cover that.

The Court: Objection overruled.

(Testimony of Delwin Calavan.)

Q. (By Mr. Powers): Is that the fact, the way I have stated it?

A. That is the fact. The crane operator unhooks from the trailer after he sets it on the truck with the boom of the truck, and no one gets out of the cab of the truck at all to unhook the rigging.

Q. So the truck driver is on one level and working down there alone throughout the operation, and the crane operator is up on his donkey where he stays?

A. Yes, he is sitting in the seat of the donkey.

Mr. Powers: I think that is all.

### Cross-Examination

By Mr. Sims:

Q. As I understand it, Mr. Calavan, the C. D. Johnson Lumber Company has nothing whatsoever to do with what the truck drivers are to do. Is that what you are saying? [163]

A. I claim, or I say, that the truck driver takes care of his own equipment, which is the truck and the binder chains and the bunk blocks.

Q. The C. D. Johnson Lumber Company tells him what he must do about the binder chains and bunk chains and all that? A. They do not.

Q. They don't do anything at all about that?

A. We have a safety poster posted at the end of the ramp where they drive in.

Q. As a matter of fact, there is actually posted over the signature of C. D. Johnson Lumber Company a sign ordering the truck drivers with refer-

(Testimony of Delwin Calavan.)

ence to the bunk chains. That's right, isn't it?

A. That's right. That is the safety rules. It is in the Code.

Q. And you have that sign up, don't you?

A. That's correct.

Q. Over the signature of the C. D. Johnson Lumber Company?      A. That's correct.

Q. Which says what they should do with the binder chains, with the releasing of the bunk chains, don't you?      A. That's correct.

Q. I am handing you, through the courtesy of the bailiff, three pictures. I direct your attention to the first picture, and ask you if that is the poster that you are testifying about?

A. No. 1 is the poster. [164]

Mr. Sims: I offer that picture in evidence.

Mr. Powers: No objection.

The Court: Is this the first picture?

Mr. Sims: This is picture No. 1 on the sheet of pictures.

The Court: Are you offering pictures Nos. 1, 2, and 3 on page No. 1?

Mr. Sims: Just the top picture; that's right.

The Court: That first picture will be cut off the other two.

Mr. Powers: I will offer the other two.

The Court: Have you any objection to the introduction of the other two?

Mr. Sims: No, I have not. If counsel wants all these pictures in for the convenience of all of us I have no objection to that, but I didn't want to

(Testimony of Delwin Calavan.)

take the time of the Court to attract any attention except to this one picture, but if counsel wants them all to go in together I think that would be convenient.

Mr. Powers: I offer 2 and 3.

Mr. Sims: How about the whole group?

Mr. Powers: If you want to. If he wants to put all the——

The Court: Do you intend to offer any of the other pictures?

Mr. Powers: I hadn't, because the large pictures are the same. The only reason I suggest as to 2 and 3 is that they wouldn't have to be cut off.

The Court: That is a pretty simple job, unless you have [165] some real objection.

Mr. Powers: I have no objection. Offer them all. Get them all in the record.

The Court: All right. All of the pictures—any writings on them? If there happens to be any writing on there, it might be scratched out. What are they marked?

Mr. Sims: Defendant's No. 6.

The Court: This group of pictures will be known as Defendant's 6.

(The paper, on which are mounted three photographs, so offered and received, was thereupon designated Defendant's Exhibit 6.)

Mr. Powers: Could the jury be looking at them while we go ahead with the witness?

(Testimony of Delwin Calavan.)

Mr. Sims: No. We can wait until the time of argument.

Mr. Powers: Well, they have to know what we are talking about.

The Court: Well, if Mr. Powers wants them handed to the jury they will be handed to the jury.

Mr. Sims: Yes, that's right.

May I suggest this: I am calling the jury's attention particularly to the one the witness is now talking about.

Q. Who is expected to enforce this rule on behalf of C. D. Johnson Lumber Company?

A. That rule is put there to try to make the truck drivers [166] obey the Safety Code.

Q. All right. And who is it of your organization that is expected to see to it that the law is complied with?

A. I suppose I am.

Q. And who is the man in charge of the actual unloading, itself—that is, the application of the power, itself?

A. Mr. Neal.

Q. That is your unloading engineer?

A. That's right.

Q. And being there seated, as he is, does he have a full, unobstructed view of this brow log and the log and the truck and his crane?

A. He has a complete view of the truck, not of the brow log when the load is in front of him.

Q. When the load is in front of him, that obscures the brow log, of course?

A. That's correct.

Q. If a man was standing on the dock in the



(Testimony of Delwin Calavan.)

area of the log and on the side that the crane operator is on, he could be readily observed by no more effort than just rolling your eyes and looking in that direction, couldn't he?

A. You mean by that a load of logs on the truck?

Q. That's right.                   A. Yes.

Q. Do I understand you correctly, Mr. Calavan, to say that [167] after you have looked and apparently everybody is in the clear on the water and on the dock, it would not be an additional safety to sound the whistle that you are going to unload?

A. As I stated before, I consider a whistle only for where you cannot see.

Q. But I am asking you, Mr. Calavan, a different question. Nobody is suggesting here that the engineer should be blindfolded and just give a whistle. That is unthinkable. We are saying to you, isn't it better, after you have looked and apparently everybody is in the clear at every possible place, to, in addition, blast this loud whistle that attracted you 300 yards away? Would it be an additional safety?

A. I have never saw it in any logging operation.

Q. I am asking you if it wouldn't be an additional safety.

A. I can't see where it would be any safer than a hand signal.

Q. Suppose there was somebody down on that dock that couldn't be seen readily.

A. There is supposed to be no one there.

(Testimony of Delwin Calavan.)

Q. All right. And suppose there is, however. Wouldn't blowing the whistle be an additional warning?

A. A whistle tends to startle more than it does to warn.

Q. Tends to what?

A. It tends to startle.

Q. Do you think it would be a good idea to startle somebody that might not be in the clear and might not be observed by the [168] unloading engineer?

Mr. Powers: Well, I object to this sort of argument. The law requires that no one shall be between the brow log and the load.

Mr. Sims: That is a matter of opinion.

Mr. Powers: It is not opinion. The law says no one shall be between the brow log and load.

The Court: The jury will disregard the remarks of counsel, but I think, Mr. Sims, what counsel is objecting to is your engaging in an argument with this witness. Ask him questions, but don't argue.

Mr. Sims: All right.

Q. Mr. Calavan, would it not be an additional protection to those who might be in that immediate area and who might sustain injury by the unloading operation—be an additional protection to avoid their injury, if, after a survey had been made by sight and apparently everybody was in the clear, a warning signal was given before the unloading?

A. My answer to that?

Q. Now, would you answer it, please, "Yes" or

(Testimony of Delwin Calavan.)

“No,” and then you go right ahead and say anything that you think might explain your answer.

A. “No” is the answer.

Q. All right. Now, you go right ahead.

A. And the reason for that is that hand signals are quite [169] customary on all these operations, and I would have already have installed such a system if I had thought it feasible. We have a whistle on the donkey, and hand signals are so much more practical, because at the time the man gives the hand signal he can be out where he can see onto the water.

Q. You think, then, it would be a definite detriment to sound an audible whistle or blast of some kind in addition to this hand signal? We all want that, you understand. We are just talking about something in addition to the looking.

Mr. Powers: He told you he thought it wouldn't help about three times.

A. My answer was “No.”

Q. (By Mr. Sims): Your answer is “No,” that it would be an unsafe practice?

A. It wouldn't be an unsafe practice, but I do not believe it is necessary, and it is impracticable.

Q. Use too much power, too much steam?

Mr. Powers: This is just argument.

Mr. Sims: Oh, no.

The Court: He can ask why it is impractical.

Q. (By Mr. Sims): Why?

A. Because, if a truck driver were to give a signal of that kind, he would have to go over to the

(Testimony of Delwin Calavan.)

water and then walk back and give the signal, because you couldn't have it over on the water side. [170]

Q. I am not talking about the truck driver. I am talking about a blast of the whistle. I guess I don't make myself clear. I mean this: Let us assume that a truck driver or your boom foreman, as in this case, walked over and looked at the water, and it was clear, apparently absolutely clear. Actually, there was a man under the dock in this water—high tide—and he is in there where Vincent can't see him, or he can't be seen, and so he signals everybody is in the clear, and the truck driver is in the clear. Now, I am asking you, why wouldn't it be a safe practice to give this whistle blast which would warn the man that could not have been seen after the hand signal was given?

Mr. Powers: Well, object to that.

The Court: Objection sustained. You have a number of facts, there, that have no relevancy to this case at all.

Mr. Sims: That is true.

Q. What is the extent of this operation? About how many employees are around there?

A. Well——

Mr. Powers: That has no relevancy, either. It is only the ones concerned with this operation here. It has no bearing on this case whatsoever.

The Court: Objection sustained. If you want to talk about this immediate dock, that is perfectly

(Testimony of Delwin Calavan.)

satisfactory, but how many employees in the mill—— [171]

Q. (By Mr. Sims): How many employees are there around the dock?

A. As a general rule, there are five.

Q. And who are they?

A. Mr. Neal, Mr. Vincent——

Q. Now, their duties; I don't care about their names. Mr. Vincent is the boom foreman; Mr. Neal is the unloading engineer. Now, go ahead.

A. Mr. Neal is unloading engineer and Mr. Vincent is in charge of the boom crew, and then there at that time there was Mr. Spoor, who was on the boom, and Mr. Clayton.

Q. They are all where?

A. They are all on the water.

Q. So on the dock would be just the two employees, Vincent——

A. There is only one, and that is Mr. Neal.

Q. Then unloading is not normally undertaken upon the signal of Mr. Vincent, as it was here?

Mr. Powers: I will object to the "unloading." That is misleading because Mr. Vincent very definitely said he gave the signal the water was clear.

Mr. Sims: Mr. Neal has testified he unloaded on the signal of Mr. Vincent, and I am asking if that is the normal operation there.

A. No one gives the signal to unload except the truck driver.

Q. Well, in this case, the testimony is that after



(Testimony of Delwin Calavan.)

the truck driver had given a signal to your unloading engineer, Mr. Neal, [172] Mr. Vincent went over the dock, a distance of 14 feet, and he came back part way, and then he signaled, and then he unloaded. I am asking you if that is the usual and normal functioning at that dock?

A. It is not.

Q. And you did not observe this particular unloading, I believe you said?

A. That's correct.

Q. How many binder chains did Dean Hutchens have in that truck ordinarily?

A. There should have been three.

Q. I mean, actually how many did he actually have ordinarily?

A. I do not know, because I didn't check the truck.

Q. You don't know whether, upon this particular occasion, then, he did have three binder chains?

A. I have no way of knowing.

Q. You only know that after this accident occurred there were only two binder chains there?

A. I do not know that. I know that there were at least two.

Q. Well, might you have miscounted and maybe there were three or four?

A. There could have been five. After all, there was a pile of chain in the jockey box, and there was the binders.

Q. You said two. Now, do you mean to say two or five?



(Testimony of Delwin Calavan.)

A. I said two. I could see two. [173]

Q. Where would the binder chain—what would have happened to the binder chain on that trailer if it had been untied at both sides, but was lying on the log? Where would it have gone?

Mr. Powers: There is no evidence that is the case here.

Mr. Sims: I am asking the question.

Mr. Powers: I know, but it has no relevancy. Mr. Neal said there was no binder chain there at the time.

The Court: You didn't have any evidence whatsoever about the binder chains.

Mr. Sims: This man is an expert, testifying as an expert, and I think we have the right to develop where a binder chain would go if it had been untied on a one-log load on both sides, where it would go, what would happen to it.

The Court: Objection sustained.

Q. (By Mr. Sims): You do not know, then, of your own knowledge whether there was or was not a binder chain on that trailer on that one log that came in there, Dean Hutchens' load?

A. No, I do not know.

Q. Who is in charge of that operation, there, in general—C. D. Johnson Lumber Company?

A. C. D. Johnson Lumber Corporation.

Q. I am talking about the defendant corporation. That is the defendant, here.

A. Mr. Dean Johnson. [174]

Q. He is the President of the Company?

(Testimony of Delwin Calavan.)

A. He is.

Q. And is general superintendent?

A. No, he is not the general superintendent.

Q. Who is the superintendent?

A. Of the logging department, Mr. C. C. Jacoby is logging manager.

Q. Were they there that day?

A. Not at the accident, no.

Q. They were not on the premises that day?

The Court: I don't see the purpose of that.

Mr. Sims: Very well. I think that is all.

Mr. Powers: That is all.

(Witness excused.) [175]

Mr. Powers: We will call Mr. Jacoby.

### CARL C. JACOBY

was thereupon produced as a witness in behalf of the defendant, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Powers:

Q. Where do you live, Mr. Jacoby?

A. Toledo; Toledo, Oregon.

Q. And you are employed by the C. D. Johnson Lumber Corporation?      A. That's right.

Q. And what is your work there, please?

A. I am logging manager for C. D. Johnson.

Q. And have been with C. D. Johnson for some time?

(Testimony of Carl C. Jacoby.)

A. It will be twenty-two years next February.

Q. And you are familiar with the operations of hauling and dumping logs, are you?

A. Very much.

Q. Now, did you have anything to do with making arrangements for having the logs delivered that are involved in this transaction?

A. I had to do with entering into a contract with a man by the name of Francis to cut, log, and deliver a certain amount of stumpage delivered in Toledo in the water.

Mr. Sims: That is a conclusion, and I move it be stricken.

The Court: I think that is just [176] background.

Mr. Sims: Just preliminary. Fine.

The Court: Objection overruled.

Q. (By Mr. Powers): And in connection with the cutting and delivery of the logs, where were they to be delivered?

A. They were to be delivered in sticks, boom sticks, in the water at Toledo opposite the mill.

Mr. Sims: I move that that be stricken.

The Court: I don't see the relevancy, but I am going to overrule the objection.

Q. (By Mr. Powers): And the compensation to be paid for the delivery of these was what—so much a thousand?

A. The compensation was so much a thousand net water scale delivered in sticks in Toledo.

Mr. Sims: Objection.

(Testimony of Carl C. Jacoby.)

The Court: Objection overruled.

Q. (By Mr. Powers): And how was it contemplated the logs would be put in sticks? Where would that ordinarily be done?

A. Well, the original contract was drawn with Francis. It was entirely up to Francis how he would do it.

The Court: I will sustain the objection to that. I think we are getting far afield, Mr. Powers.

Mr. Powers: Well, I am getting at who was in charge of this operation, and I would like to pursue it for that reason.

The Court: You mean who was in charge of the operation by which the logs were delivered to the C. D. Johnson mill? [177]

Mr. Powers: Into the water, yes. Whose responsibility it was to put the log into the water and who paid for it.

Mr. Sims: Well, of course, if the Court please, at the pre-trial conference it was contemplated in the order, I believe—and it will do no violence to the facts to suggest this—that they have their records to show that a charge was made by the defendant company to Mr. Francis, but I feel that we are going out then into another matter which is of no particular consequence. However, I am perfectly willing to stipulate that it is a fact that the C. D. Johnson Lumber Company did, in truth and in fact, unload and charge Francis for the unloading. If that will facilitate matters.

(Testimony of Carl C. Jacoby.)

Mr. Powers: That is all prejudicial talk before the jury, what he is saying.

The Court: The jury is instructed to disregard the remarks of counsel.

Mr. Powers, I have ruled previously that it didn't make any difference what the relationship was as long as he was on there lawfully.

Mr. Powers: Yes. Well, I am familiar with your Honor's ruling. This goes to who was in charge of the particular unloading of that truck.

Mr. Babcock: If the Court please, may I suggest in this connection that what may have been contemplated at one time or changes made are not material. The only materiality would [178] be how the logs were delivered and how they were unloaded.

The Court: That is the particular advice of your question and the answer of the witness. What may have been the contractual arrangement may not have been the actual practice then.

Q. (By Mr. Powers): I will ask you this, then, Mr. Jacoby: Did you or anyone for the C. D. Johnson Lumber Corporation give any directions as to the details, as to the manner of doing the logging, the manner of hauling the logs in or the manner of fastening their chains, or was that up to the logger?

A. It is entirely up to the logger. As a matter of fact, our man Francis is an independent contractor. He undertakes a job to deliver logs, and who he hires or how he goes about it—just so he goes about it in a reasonable manner is all we are concerned with.

(Testimony of Carl C. Jacoby.)

Q. Your concern is that the logs are delivered?

A. That is it. We have nothing to say about who he hires or anything about it.

Q. Well, now, when the logs were delivered, such as the one delivered by the deceased, whose duty was it to get the log ready for unloading?

A. Oh, in the method that is used down there, the truck driver. He is responsible for his truck, for his load, when he comes in there. We hope that he takes care of himself, takes care of his equipment. He removes the binder chains. There is a certain procedure that they all go through, and it is up to him [179] entirely to look after the unloading.

Q. And who gives the signal to unload?

A. When he has his truck all ready to unload with the binder chains off and his bunk blocks knocked loose, then he is supposed to walk around to either end of his truck—he can walk to either end—and look over into the water and see if everything is all right, and then he turns and gives the signal, hand signal, to the operator, the crane operator.

Q. While that work is being done by the truck driver, does the crane operator leave his position, or does he stay right with the crane?

A. Stays right in his seat where he belongs.

Q. And they are actually working on different elevations, are they not?

A. That's right.

Q. Are they intermingling with each other?

A. No, they are not.



(Testimony of Carl C. Jacoby.)

Mr. Babcock: The same objection, your Honor, that it calls for a conclusion and opinion. I think the facts speak for themselves.

The Court: Objection sustained.

Q. (By Mr. Powers): Now, in your long experience with logs, can you say or can you state to the jury whether it is a safe operation for the truck driver to give that signal to unload as it would be for anybody else to give it, or what is your [180] opinion?

A. I think our method is about the safest you can have.

Q. And now Mr. Neal has worked down there for you for a long time?

A. Mr. Neal went to work on that job, I believe, either '38—1938—and has been there ever since.

Q. And can you tell the jury whether you found him to be familiar with the signal that would say to unload, to go ahead and unload?

A. He has been a satisfactory employee for twelve years on that job.

Q. How do you feel about the visual signal, giving the signal by hand and actually looking to see that it is clear instead of giving a signal by whistle?

Mr. Babcock: Object to the form of the question because it assumes facts not in evidence. We are not suggesting that it be alternative, but in addition.

The Court: And how he feels about it would be of no consequence.

Mr. Powers: I think he is about as much of an

(Testimony of Carl C. Jacoby.)

expert as you have had here. He has been in the business for 22 years.

The Court: Mr. Powers, you know how to ask a question. Ask it right.

Q. (By Mr. Powers): Well, in your experience, do you see any safety factor in having a whistle in addition to the visual hand [181] signal?

A. The whistle wouldn't be any help at all. As a matter of fact, it would be worse, be a detriment. When a man gives a signal with his hand he sees what he wants to signal about, and if, in his judgment, everyone is in the clear, that is a highball (demonstrating). Go ahead.

Q. Let me ask you, what is the rule with respect to a truck driver going between the load on the truck and the brow log?

A. Well, if he ever does it it is one of the foolishhest things he can do.

Q. Is it forbidden by the Safety Logging Code?

A. Oh, I can't answer that, frankly. By common sense it is forbidden, yes.

Mr. Sims: I move that be stricken. It is argumentative.

The Court: The remark of the witness will be stricken.

Mr. Powers: We will offer in evidence the contract between Johnson and Francis——

Mr. Sims: Objected to.

Mr. Powers: ——which is Exhibit No.—I have forgotten which number you stated yesterday. It is probably No. 1 or No. 2.

(Testimony of Carl C. Jacoby.)

The Court: I think there is evidence here, Mr. Powers, that at the time of the accident they were not operating under this contract.

Mr. Sims: There was a modification. [182]

Mr. Powers: I haven't heard of it.

Mr. Sims: There is a modification testified to on the present state of the record.

Mr. Powers: No; you objected to what he was going to claim about the modification.

The Court: No, he didn't. Objection sustained.

Q. (By Mr. Powers): Were these logs being delivered under a contract? A. Yes.

Q. Between C. D. Johnson and Francis?

A. Yes, sir; the same contract still exists.

Mr. Powers: We offer the contract.

The Court: Has that contract been modified, Mr. Jacoby?

A. No, that contract is just as it was written, and it is still in effect. He has another year to go.

Mr. Sims: Well, may I ask one or two questions?

We were told yesterday by someone that you had abandoned the contract requiring delivery at the water; that it had been changed to somewhere else, and they were being delivered at Toledo.

The Witness: That doesn't change the contract. He still must deliver them at Toledo.

Mr. Sims: I am asking you, was that the original plan, and then was there a change? You can say "Yes" or "No," and then go right ahead. [183]

The Witness: Well, ask me again, please.

(Testimony of Carl C. Jacoby.)

Mr. Sims: Well, the question is, the contract you have referred to with Francis was for delivery at another point and another place and a different operation. That was down at where?

The Witness: That isn't—

Mr. Sims: Where was the place?

Mr. Powers: Well, let him answer the question. He asks one, and before the witness can answer he begins to ask another one.

The Court: Ask him the question, now, Mr. Sims.

Mr. Sims: I want to know if your original plan was different than the one that brought your logs in to your landing, your dock, at Toledo.

A. Just as the contract states.

Mr. Sims: Well, now, tell us.

A. If I get what you mean, I would say this: That when the contract was written Francis had the job of delivering logs in Toledo. Now, he had the option of doing any way he wanted to. He could unload the logs in Newport over a private dump that is owned by Sergeant Brothers, and then have them rafted and towed to Toledo. Now, we have nothing to do with that. Also, we operate our own dump at Toledo, which would require Francis to haul his logs by truck an additional eight and one-half miles and put them over our dump, which he finally elected to do. [184]

Mr. Sims: That is what I was going to say.

A. He elected to do that, but there is no modification of the contract.

(Testimony of Carl C. Jacoby.)

Mr. Sims: And that is what he did?

A. That's right. He did both ways.

Mr. Powers: He did both ways?

A. He did, yes.

Mr. Sims: At this particular time they were coming into Toledo?

A. That's right.

Mr. Sims: And you charged him—I mean C. D. Johnson Lumber Company actually charged him—for the unloading of these logs?

A. That is, he paid his proportionate share, yes.

Mr. Sims: You took it out of his money?

A. That's right.

Mr. Powers: Is that all, Mr. Sims?

Mr. Sims: That is all.

Q. (By Mr. Powers): Now, I think we could show what is this proportionate share. Where did that go? What was that for? A. For years.

Q. What did he pay for—the proportion?

A. That proportionate share meant that he was charged with the labor cost of operating that unloading rig, one man's pay.

Q. And that would be Mr. Neal in this case?

A. That would be Mr. Neal and the other man on the other shift. [185] It is run on a two-shift basis.

Q. So actually Francis or Hutchens—it was charged against Francis, here, was it?

A. Absolutely.

Q. That proportionate share would be to pay



(Testimony of Carl C. Jacoby.)

Neal's wages up there while he was doing the work there and unloading the logs?

A. That's right.

Q. Now, in your contract did you have an agreement that the logger would obey all the laws relating to logging and the rules for logging?

A. Right.

Mr. Babcock: Just a moment. I want to object because the contract is the best evidence, and on the further ground that it is irrelevant and immaterial to this case.

The Court: Are you still objecting to the contract?

Mr. Sims: No; he qualified it.

The Court: All right. Are you reoffering the contract now?

Mr. Powers: Yes.

The Court: It will be admitted.

(The document, so offered, being contract between C. D. Johnson Lumber Company and William R. Francis, dated April 18, 1949, was thereupon designated Defendant's Exhibit 1.)

Mr. Powers: And we waive reading part of it. I should like to call the jury's attention to part of it. [186]

Mr. Sims: We are willing to waive the rule that he read it in its entirety. It is perfectly agreeable that he read it at the time of argument to shorten the trial.

Mr. Powers: Well, I can summarize it. That is what I was going to do. I can summarize it.



(Testimony of Carl C. Jacoby.)

The Court: You are either going to read it in its entirety——

Mr. Powers: That is what I would like to do now. I would like to read portions of it.

Mr. Sims: No. If it is to be read I want it all read. You can't piecemeal it. If he wants it read he should read it in its entirety.

Mr. Powers: Oh, there is nothing to that.

The Court: I don't think I am going to require him to read the whole thing.

Mr. Powers: This is a logging contract dated April 18, 1949, between C. D. Johnson Lumber Company, a corporation, and William R. Francis, designated as "Logger," and it provides for logging over a certain area. "As compensation"—this is Paragraph VI—"for said logging and removing of timber from said land, owner shall pay the logger the sum of \$15.00 per thousand board feet net water scale."

Q. What does that "net water scale" mean?

A. Net scale means commercial scale, what logs are bought and sold on in the water.

Q. In the water. And that is for old growth and yellow fir [187] and logs delivered in sticks by the logger at Toledo, Oregon. What does that delivering in sticks mean?

A. That means delivering in boom sticks. Boom sticks are for making the rafts.

Q. "Such payments shall constitute full compensation for all services and claims by Logger under this contract, including transportation taxes

(Testimony of Carl C. Jacoby.)

and taxes provided for by State Forest Research and Experimental Tax Act (timber severance taxes). Payments hereunder shall be made by Owner at its office in Toledo, Oregon, on or before the 10th day of each month following the month in which logs are delivered. Logger may draw, on the 15th day of each month, such sum as shall be reasonable, not exceeding such sum as may be equivalent to the compensation then due Logger.”

Then, skipping—this is (7): “Logger shall conduct logging operations hereunder in a businesslike and efficient manner, in accordance with modern and approved logging methods, and shall keep and observe all state and Federal laws, rules and regulations now or hereafter applicable thereto and to employment of labor thereunder. Logger shall fall, buck and remove \* \* \*” and so on.

Then a provision for branding logs.

And this is the contract you were operating under at that time?      A. That’s right. [188]

Q. Did you have any other dealings with Dean Hutchens or were they all between Dean Hutchens and Francis?

A. I never had seen, didn’t know who he was, had nothing to do with him in any way.

Q. He was not an employee of C. D. Johnson?

A. Not at all.

Mr. Powers: I believe you can take the witness.

(Testimony of Carl C. Jacoby.)

Cross-Examination

By Mr. Sims:

Q. Mr. Jacoby, would you refer to the records of the Company which Mr. Powers has brought here, which have to do with this contract, and point out what the charges were. I don't know what Mr. Powers has there.

Mr. Powers: I think I can get it for him.

Mr. Sims: Very well. I wonder if you would take No. 2 from the envelope.

Mr. Powers: It is marked No. 3.

Q. (By Mr. Sims): As counsel reads that, I would like to review the question.

It is simply to review the records counsel is handling and I will ask you if that is the method of charging Francis for the use of your facilities, your crew, and all that at the unloading dump. Now, if I can see that through your eyes, Mr. Jacoby—will you just tell me what it is you are looking at as to the charge and amount? [189]

A. Well, this is a copy, a carbon copy, of the voucher check issued.

Q. What does that show, please?

A. It shows what he was to receive. It shows his scale for the month of old growth.

Q. What was his scale? In other words, how much stuff did he deliver there at your dock and how much did you hold out for this unloading?

A. It shows he put in 97,738 feet of old growth at \$25.00, 449,493 second growth, and other species.

(Testimony of Carl C. Jacoby.)

at \$21.00. This sheet doesn't—yes, it shows here “less dumping of logs, \$57.46.”

Q. All right. Now, the \$57.46 that he was charged would take care of how many days' operation?

A. For the whole amount of footage that was put in.

Q. It depended on footage?

A. That's right.

Q. And he was charged, then, at what rate per thousand?

A. The rate varies. It is his proportionate share.

Q. Give us the way it would vary. About how much would it run?

A. Here is the way it is figured. We have about, oh, they run from five to twenty different operators putting in logs on this log dump. Now, we don't intend—we have no fixed rate. All we want the loggers to do is pay for the labor cost of that dump, the operator alone, so that some months there is 5,000,000 feet put in. It runs as low—that would mean about [190] an average of 8 cents a thousand. Some months it runs—when there is only 2½ million put in, it is doubled, so it will run anywhere from as low as a thousand—it is a non-profit setup, anyhow, and it may run from 6 cents up to 30.

Q. And so there was no record made as to any particular truck or any particular operation? In other words, you average it all out. If your facilities, there, took care of a lot of logs, the rate per thousand would be less?

(Testimony of Carl C. Jacoby.)

A. That's right. The record is kept, though, specifically on each operator. We know what each operator puts in, so we charge him. We find out what the average cost is, and then we multiply it by his total output, and that is his charge.

Q. That's right. And so there is no special charge for any particular truck?

A. Not necessarily, no.

Q. Well, just absolutely not. It is the operator. In other words, when Dean Hutchens came in there, Dean Hutchens didn't pay you anything?

A. He did not, no.

Q. There was no deal? In other words, what I am getting at is you didn't—

A. We didn't know Dean Hutchens.

Q. You didn't know him at all; you weren't working for him; you weren't working under his direction at any time?

A. No. [191]

Q. When he came on your property he came on there bringing in your logs through this arrangement with Francis?

A. Yes, it was our stumpage.

Q. It was your stumpage that Francis was bringing in there?

A. That's right.

Q. And so when Dean Hutchens came in he was subject, then, to the use of your facilities and your employees in this unloading operation. Is that correct?

Mr. Powers: Well now—

A. He came in here, as far as I know, on his own.

(Testimony of Carl C. Jacoby.)

Q. (By Mr. Sims): At least, he was there with your logs?

A. They weren't our logs then. No, they were still Francis' logs.

Q. They were your logs when they got in the water? A. As soon as we scaled it, yes.

Q. Whom did Calavan take orders from?

A. Oh, he worked directly under me.

Q. In other words, he took orders alone from the defendant, the defendant corporation, the defendant Johnson Lumber Corporation?

A. He would take them under me, yes.

Q. What I am getting at is, he wasn't taking any orders from Dean Hutchens?

A. I wouldn't think so.

Q. Well, you know he wouldn't?

A. Well, I wouldn't think so. [192]

Q. That is right, isn't it? One answer, Mr. Jacoby, that I didn't quite understand, after there has been a hand signal to unload, why would it be worse, if, after there had been a hand signal to unload and everybody was in the clear, for there to be an audible whistle, then, "We are going to unload," by the engineer?

A. You say why would it be worse?

Q. Why would it be worse?

A. Oh, it wouldn't do any particular good.

Q. Well, would it be worse? Did you really mean that?

A. Yes. I don't think there is anything better



(Testimony of Carl C. Jacoby.)

than a hand signal given by a man who is seeing what he is doing.

Q. All right. But after you have actually seen the hand signal, could it have done any harm to have followed the hand signal by a whistle?

A. If this man giving the signal could do it himself, yes, but not to depend on someone else to do it.

Q. In other words, you feel it would have been a safer operation if the man giving the hand signal also gave a whistle signal? Am I right?

Mr. Powers: We object to that.

A. I don't say that.

Q. (By Mr. Sims): I am asking you——

Mr. Powers: We object. That is not in the case whatsoever.

Mr. Sims: He is an expert. It is in the [193] case.

Mr. Powers: There is no issue on that.

Mr. Sims: Insufficient employees.

The Court: You are asking this witness if the truck driver should also give the whistle signal in addition?

Mr. Sims: I am not saying the truck driver. I am saying the man giving the hand signal. If the man giving the hand signal also had a whistle, might it be better?

The Witness: I didn't say that.

Mr. Sims: Apparently I was misunderstood.

The Court: Will you please ask your question over, and I want to caution you again, please,

(Testimony of Carl C. Jacoby.)

don't argue with the witness. Ask him a question.

Q. (By Mr. Sims): Mr. Jacoby, my question is, if there is a man on the dock—I don't care whether you are going to call him a truck driver, a safety engineer, or another employee—that has the responsibility of observing that the men on the water are clear, that the men on the dock in the immediate area involved are clear, if, after he gives the hand signal, he also gave a whistle signal, wouldn't that be an added safety?

A. No, I don't think so.

Q. You don't think it would add?

A. No, I do not.

Q. Do you think it would make the operation more dangerous?

Mr. Powers: I don't think that enters into it, whether it makes it more dangerous or not. [194]

Mr. Sims: Well, that is what he testified to.

The Court: Are you through with this witness, Mr. Sims?

Mr. Sims: I think so, your Honor.

Mr. Powers: That is all.

(Witness excused.)

The Court: Have you any other witnesses?

Mr. Powers: Defendant rests.

Oh, there was one thing before I rest. I want to offer in evidence that ruling from the Industrial State Accident Commission.

Mr. Babcock: To which we will object, your

Honor, and if there is going to be argument——

The Court: Objection sustained.

Mr. Powers: I see.

The Court: Now, you are resting subject to your right to make an offer of proof on Mr. Calavan, or in view of Mr. Jacoby's testimony?

Mr. Powers: Well, I think what I could do now before I rest is also offer the other exhibits which were the records of Francis which were marked the other day showing his pay roll and——

Mr. Sims: Oh, I object to that.

The Court: Objection sustained.

Mr. Powers: That would be for purposes of establishing the [195] status of the decedent.

The Court: That's right. You may have an exception.

Do I understand you now that you have abandoned your request to make an offer of proof?

Mr. Powers: No, I think your Honor let the testimony in. We were talking about the contract, and Mr. Sims went into the contract so much that the first thing you know it was in.

Mr. Sims: We withdrew and put it in, but I didn't know that was what——

Mr Powers: I think that what the offer of proof was was testified to.

The Court: I don't ask you to put in any more testimony, Mr. Powers. I just asked if you wanted to put it in.

Mr. Powers: I wanted to put in all the exhibits, and I mentioned them one by one, and I assume I have an exception to the ones not admitted?

The Court: You have.

Mr. Sims, have you a rebuttal witness?

Mr. Sims: We may have. I would like a few moments.

The Court: The reason I am suggesting this is that if it is not going to be too long we may take our recess all at one time.

Mr. Sims: Fine; if we can accommodate all.

The Court: Well, are you going to find that out?

Mr. Sims: I will resolve it right away. [196]

The plaintiff will offer no rebuttal.

The Court: Ladies and gentlemen of the jury, we will take a recess for about fifteen minutes.

(Thereupon the jury withdrew from the courtroom, and the following occurred without the presence of the jury:)

The Court: In view of the fact that I have just gotten some additional instructions, Mr. Powers, it is very difficult for me to comply with the rule which I usually comply with, and that is to tell you what I am going to instruct before the arguments. I think, however, from the rulings I have made it is fairly clear to you how I am going to instruct, but I am not in a position to set out with particularity at this time which instructions I will give either in the form submitted or in a modified form, and which of those I am going to reject. However, if you desire, I will generally set forth some of the things which I think that I am going to instruct.

In the first place, I would like to ask counsel for plaintiff some questions. Are you contending that

the plaintiff's decedent was subject to the Act as a matter of law or do you concede that that is a question to be decided by the jury?

Mr. Babcock: I think there is a mixed question there, your Honor. We will concede the question as to whether risk and danger was involved is a question for the jury.

The Court: You concede that? [197]

Mr. Babcock: Yes. However, we contend that the question of his status is a question of law, and whether under the status as shown he is one of the class of persons entitled to the protection of the Act in working in work involving risk and danger, as a matter of law, and I think it might be appropriate at this time to state for the record that we will withdraw our requested instructions No. 4 and No. 5 and No. 6.

Mr. Powers: I would like to state for the Court I intend to make a motion for a directed verdict. I assume from what you state that it will not be granted.

The Court: Well, go ahead. If you want to make it at this time, go ahead.

Mr. Powers: Yes.

Comes now the defendant C. D. Johnson Lumber Corporation and moves the Court for an order directing the jury to return a verdict in favor of this defendant on the grounds and for the reasons heretofore stated in our motion for a judgment of involuntary nonsuit, which, if the Court wishes me, I could have the reporter repeat at this time, or, if not, if the Court is familiar with them, I will

just refer to them and include them in this motion by reference.

The Court: You may include the whole thing by reference.

Mr. Powers: Thank you.

And in addition to that ground, on the further ground that it now appears after all the evidence is in and all parties [198] have rested, that the status of the decedent is purely speculative, here. There is no evidence that he was an employee of anyone, and there isn't sufficient evidence as to his being an independent contractor.

Now, this Act certainly applies to someone, and they have the burden of showing that status in order to bring him within the purview of the Act. It was one of the contentions that they made that he was an employee of Francis, and they apparently abandoned it. They offered no evidence of it.

On the other hand, the evidence we offered—that is, I am speaking about defendant C. D. Johnson Lumber Corporation—which would have shown that he was an independent contractor, was rejected by the Court, so now, as the matter stands, the man's status is static, which means nothing. Nobody knows what his status was, and certainly, under that situation, there would be no basis for allowing any recovery under the Employers' Liability Act.

Mr. Sims: There is a stipulation.

The Court: The motion is denied.

Mr. Powers: Exception allowed?

The Court: Exception allowed.

(After discussion between the Court and



counsel regarding various requested instructions, the jury re-entered the courtroom, and the following occurred within the presence of [199] the jury:)

The Court: We are now involved in a little argument, and we thought that it would be quite inconvenient for members of the jury if counsel would start to argue the case sometime this afternoon, because we want to leave by 5:00 o'clock, if possible, and therefore it has been suggested, and I acquiesce in the suggestion, that we come back at 9:30 tomorrow morning, and we will be through, we hope, with the arguments and the instructions by noon-time. Is that satisfactory with the members of the jury?

We will now adjourn until 9:30 tomorrow morning.

(Thereupon an adjournment was taken until tomorrow, Thursday, June 21, 1950, at 9:30 o'clock a.m.) [200]

Thursday. June 22, 1950

The trial was resumed, pursuant to adjournment, at 9:30 o'clock a.m., and the following further proceedings were had herein:

(At the close of the evidence and following argument by counsel to the jury in behalf of the respective parties, the Court charged the jury as follows:)

The Court: Ladies and gentlemen of the jury: You have heard all the evidence and the arguments

of the attorneys in the case of Kathleen Hutchens, plaintiff, vs. the C. D. Johnson Lumber Corporation, defendant, and it is now my privilege and duty to lay down for you the rules of law which you are to follow in deciding the questions of fact that the Court is about to submit to you.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find from the evidence before you without any bias or prejudice or sympathy. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been told many times during your service as jurors that what an attorney says either in the course of a trial or in his argument to you or to the Court is not evidence. It is your duty to take the facts as you see them in the evidence and to draw whatever inferences or deductions that you believe [201] solve the questions of fact. A Judge of a Federal Court has the privilege of commenting upon the evidence. If I shall comment upon the evidence I will indicate it, and you are not bound by my opinion. If you know or think that you know by any expressions or words of mine what I think about this case and how it shall be determined, you are not bound by my opinion. You are the sole and exclusive judges of all questions of fact

and of the credibility of all witnesses; however, I will lay down certain rules of law to govern you in your determination of the facts, and these rules are final and binding upon you whether you agree with them or not. Without any further introduction, then, I will proceed to the legal basis of this case.

Plaintiff Kathleen Hutchens alleged that her husband was killed on April 19, 1949, on the premises of the defendant, C. D. Johnson Lumber Corporation, at Toledo, Oregon, when he was struck by a log which was being unloaded from the truck which he was operating, and that her husband at the time he received his fatal injuries was engaged in work entitling him to the benefits and protection of the Employers' Liability Act of Oregon. The defendant, C. D. Johnson Lumber Corporation, admits that Dean Hutchens, husband of plaintiff, was killed on its premises in connection with the unloading of the truck he operated, but they deny that at the time he was injured he was entitled to the benefit and protection of the Employers' [202] Liability Act.

Defendant further denies that Dean Hutchens was killed as a result of any negligence on its part or any failure on its part to comply with the requirements of such Act. On the contrary, the defendant alleges that the fatal injuries sustained by Dean Hutchens were solely the result of his own negligence.

At the outset I want to call your attention to the fact that the defendant was not the insurer of the safety of the plaintiff's decedent, Dean Hutchens,

or any of its employees or any other persons using its facilities. Just because an accident happened does not mean that under the rules of law there is any liability on the defendant; in other words, the mere happening of an accident does not entitle the plaintiff in this case to be paid by the defendant even though her husband was killed as a result of such accident, and in sawmills and lumber camps there are such things as unavoidable accidents; that is, accidents which happen without the fault of anyone. If you determine that such is the case here your deliberations will be at an end and your verdict must be for the defendant even though a death resulted.

Legal liability is based upon a breach of duty; in other words, there must first be a duty incumbent upon the defendant. Second, there must be a breach of that duty. And, third, there must be injury or damage proximately resulting [203] from such breach of duty. Unless you find all three things there can be no legal liability.

As you know from your previous experience on this jury, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. However, the Oregon Employers' Liability Act, the law under which this action was brought, holds the defendant to a different and higher standard of conduct for the care and protection of persons entitled to its benefits, and

the failure of a defendant to comply with the requirements of such Act with respect to any person entitled to its protection is negligence per se, or, negligence as a matter of law, and this is true regardless of whether or not you think that a person of ordinary prudence would have been required to live up to the standards set forth in such Act.

The Oregon Employers' Liability Act requires—and I am reading now from the Act—"All owners, contractors, or sub-contractors, or other persons having charge of or responsible for any work involving risk or danger to the employees or to the public shall use every device, care and precaution which is practicable to be used for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or [204] device, without regard to the additional cost of suitable materials or safety appliances or devices."

Your first inquiry therefore will be whether the work of the plaintiff's decedent—that is Dean Hutchens—was engaged at the time of the fatal accident involved risk or danger. If you find from a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time and place of the fatal accident involved risk or danger, then he was entitled to the protection and benefits of the Oregon Employers' Liability Act; and if the defendant, C. D. Johnson Lumber Corporation, is subject to the Act, the duties imposed upon it are not delegable; in other words, the defendant is charged with the responsibility of seeing to it that



the requirements of the Act are adhered to and it may not pass on these obligations by contract or any other method.

Mention has been made of the fact that Dean Hutchens was not employed by the defendant but by W. R. Francis, or that he was self-employed. In this connection I instruct you that his employment status and the contractual relation between Francis and Dean Hutchens, or between Francis and the defendant, in so far as any issue in this case is concerned is immaterial, and Dean Hutchens was or was not entitled to the benefits and protection of the Employers' Liability Act solely on the basis of whether the work which he was doing at the time and the place of the accident involved risk or danger. [205]

I have used the words "risk or danger" several times, and I want to explain that in considering whether the work involved a risk or danger you should consider those words in their ordinary sense, and the question presented is whether the work being carried on at the particular time and place was inherently dangerous.

If the plaintiff failed to prove by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the accident, at the time and place of the accident, involved risk or danger, then your deliberations will be at an end and you will return a verdict for the defendant. On the other hand, if you find by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the fatal accident did



involve risk or danger then the defendant C. D. Johnson Lumber Corporation was subject to the Oregon Employers' Liability Act and was under a duty to observe and carry out its provisions.

Now, if you so find that it was under the act, your next inquiry will be: Did the defendant C. D. Johnson Lumber Corporation breach that duty?

The plaintiff in this case has the burden of proof to establish a breach of that duty because the law presumes that the defendant has performed all the duties incumbent upon it under the terms of the Employers' Liability Act. In order to recover plaintiff must establish by a preponderance of the [206] evidence that the defendant has not carried out the duties imposed upon it by the Act.

Preponderance of the evidence means the greater weight of the evidence. Now, the greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you give to the witnesses, or by reason of other evidence that may have been introduced. If you find upon any claim of evidence set forth by the plaintiff against the defendant that the evidence is evenly balanced or inclines towards the contention made by the defendant, then the plaintiff is not entitled to recover on that particular issue.

Now, the plaintiff was required to specify the manner in which she claims that the Act has been violated or in which the defendant breached its duty to Dean Hutchens, her husband. I instruct you that the plaintiff is bound by such allegations of negli-

gence charged against the defendant, which I will outline for you, and she must recover, if at all, in this action upon those allegations and no others. Or, if you should believe that the defendant was guilty of negligence or violated the provisions of the Employers' Liability Act in some particular not mentioned in my instructions, you cannot consider such other negligence or breach even if you find that it existed.

Now, the claims upon which plaintiff must recover, if at all, are the following: First, plaintiff charges that [207] defendant failed to have stationed at the loading dock an additional employee to assist the unloading engineer in the unloading of logs and to give signals for the unloading of logs and to perform the duty of making certain that all persons were in the clear before the load was discharged; second, the plaintiff charges that the defendant failed to require that all signals for the unloading of logs should come from a single designated person.

In considering these two specifications—and we will consider other specifications later—you will review the evidence which was submitted on this subject, and which evidence was in sharp conflict. As you will remember, some of the witnesses testified that it was practicable to have another employee who would give all of the signals, and other witnesses denied that such employee was neither necessary or practicable. It will be your duty to determine whether the failure of the defendant to maintain such an employee violated its duty under

the Act to use every device, care and precaution practicable to be used without impairing the efficiency of the operation, but I call your attention to the fact that there must be some reasonable relationship between the maintenance of an additional employee and greater safety.

As I previously stated, plaintiff has the burden of proof on each of these specifications and must prove by a preponderance of the evidence that it was the duty of the [208] defendant under the Act to provide and maintain such additional employee.

In its third specification the plaintiff charges that the defendant failed to make and enforce proper rules and regulations for the safe operation of the dump and conduct personal safety instructions for the employees engaged in the performance of the work at the dump.

You will recall the evidence which was submitted on this subject.

Likewise, there were only two men on the dock besides Dean Hutchens. They were Mr. Vincent, a foreman, and Mr. Neal, the unloading engineer. I leave it to you to determine whether these men were qualified by experience and training to supervise the activities under their direction and whether or not there were proper rules and regulations in effect at that time.

Plaintiff also alleges in its fourth specification that the defendant was negligent in causing the log to be unloaded from the truck without notice or warning to the decedent; and, fifth, it was negligent—that is, the defendant was negligent—in un-

loading said log without observing that the decedent was in the clear.

The evidence on these two specifications is likewise in sharp conflict. There was testimony that the signal which Hutchens gave was not a "go ahead" signal and that there was an interval of time between the giving of the signal by Hutchens [209] and the actual unloading of the log by Mr. Neal. There was also evidence that Mr. Hutchens gave a hand signal to go ahead, that he was in a place of safety at the time such signal was given, and that the unloading engineer proceeded to unload the log a few seconds later after he had obtained another signal from Mr. Vincent that the pond was clear.

You are to consider this evidence together with the other testimony that was introduced in this case and determine whether or not the plaintiff has sustained the burden of proof on these two specifications.

Plaintiff's last specification of negligence is that the defendant failed to provide the unloading machine with an audible warning device and that it failed to sound an audible warning before unloading the log. Here again there is a conflict in the evidence as to whether the sounding of a warning by whistle in addition to a hand signal was either practicable or necessary, and I leave it to you to determine whether the failure to provide a whistle, and the blowing thereof before the logs were unloaded, constituted a breach of defendant's duty under the Employers' Liability Act.

I want to repeat again that the plaintiff has the burden of proof by a preponderance of the evidence the specifications upon which it relies. However, it is not incumbent upon the plaintiff to prove more than one of these specifications. If she has proved that the defendant breached its duty with [210] regard to any one of the specifications by a preponderance of the evidence you will then go to the next point and determine whether or not such negligence so proved was the proximate cause of the injury and death of Dean Hutchens.

However, if you find that the plaintiff has failed to prove that the defendant has breached its duty with respect to any such specifications, your deliberations will be at an end and you will return a verdict in favor of the defendant; on the other hand, if you find that the plaintiff has by a preponderance of the evidence proved that the defendant has breached its duty in one or more of the respects above specified, you will consider whether or not such negligence was the proximate cause of the death of Dean Hutchens.

Now, proximate cause is probable cause. It is the dominant cause from which injury follows as a direct, immediate and natural consequence; therefore, if you find that the defendant was guilty of negligence that does not settle your problem unless you go further and find that the particular negligence was the proximate cause of the injury and death, that cause which actually produced the accident and death. To be the proximate cause of injury the act must have directly produced the injury and



it must have been the cause without which the accident and death would not have occurred.

If you find that Dean Hutchens himself did certain acts which were the sole cause of the accident, then you could [211] not find that any act of negligence on the part of the defendant was the proximate cause of the accident and death, even though you find that the defendant had been negligent. If, on the other hand, you find that any act of negligence on the part of the defendant was the proximate cause of the injury, then you will find for the plaintiff upon that issue and you will then take up the other questions which I will outline for you.

The defendant has alleged that Dean Hutchens was guilty of negligence and that his negligence was the sole and proximate cause of the accident and his death; that is, the C. D. Johnson Lumber Corporation alleges that this accident and the resultant death of Dean Hutchens was solely caused by his own negligence.

Now, in so far as the negligence of the plaintiff is concerned, it may be defined as follows: Negligence is the doing of an act which an ordinarily reasonable and prudent man would not have done under all of the circumstances, or the failure to do an act which an ordinarily reasonable and prudent man would have done under the same or similar circumstances.

The defendant has alleged that the plaintiff was guilty of negligence in certain particulars, and you may consider these particulars and no others. That



is the same thing that I instructed you with reference to the charges of negligence made by the plaintiff against defendant. You can consider only those specifications. And, likewise, in connection with the [212] specifications of negligence made by the C. D. Johnson Lumber Corporation against Dean Hutchens, you may consider only those specifications and no others, and if you should believe that Dean Hutchens was guilty of negligence in some other particular you may not consider such other negligence for any purpose whatsoever.

On these specifications of negligence made by the C. D. Johnson Lumber Corporation against Dean Hutchens, the defendant has the burden of proving one or more of them and must prove such specifications by a preponderance of the evidence. The defendant's specifications are as follows:

First, that Dean Hutchens failed to comply with the standing instructions of the defendant to all truck drivers to stand clear of the loading operation and in particular not to stand between the truck and the brow log; that Dean Hutchens failed to arrange to load his truck in such manner that the binders and bunk block chains could be released from the side of the truck opposite from which the logs will roll in unloading; three, in leaving a place of safety and placing himself in a perilous position, between the log being unloaded and the brow log, after having given the signal to the crane engineer to unload the log on his truck; and, fourth, in failing to take a safe position while the log was being unloaded

from his truck when there was a safe position open to him.

I don't think there is any question that Dean Hutchens [213] was between the truck and the brow log at the time of the accident, and that it was a dangerous place to be, not only dangerous for him but for any other person to stand between the brow log and the truck during the time that the unloading operations were in progress, and that is a matter of comment I make. However, you have heard all of the testimony and I am leaving it to you to determine whether under such testimony and the other evidence that was introduced whether or not Dean Hutchens was guilty of negligence in any particular specified by the defendant.

Of course, if you find that Dean Hutchens made his own working conditions and that the accident and injury resulted from such working conditions which he himself made, then the defendant is not responsible for such accident or injury and your verdict would be for the defendant.

Now, as I have stated before——

In connection with that instruction I want to say that the accident and injury would have to result solely from his own working conditions, and if Dean Hutchens was injured and killed partially as a result of the failure of the C. D. Johnson Lumber Company to comply with the terms of the Act and that such failure contributed to his accident, then that would not exonerate the lumber company, the defendant lumber company.

Now, as I have stated before, if you find that the

accident was solely caused by the negligence of Dean Hutchens [214] and there was no negligence on the part of the defendant, C. D. Johnson Lumber Corporation, which contributed to the accident and injury, your verdict must be for the defendant; however, under the Employers' Liability Act negligence on the part of the plaintiff which contributed to the accident and death can only be considered by you in the mitigation of damages.

I want to point out here that in consideration of the specifications of negligence made by the plaintiff against the defendant, and the specifications of negligence made by the defendant against Dean Hutchens, that each party had a right to assume that the other would observe the law and would exercise reasonable care, but no one had the right to proceed on that assumption if he knew, or in the exercise of reasonable care should have known, that the other was not using the care required of him or was not obeying the law in some other particular.

Now, ladies and gentlemen, if you have found that there is liability on the part of the defendant first because the Oregon Employers' Liability Act covers this case; second, because the defendant breached its duties under the Act; and, third, because such breach or breaches proximately caused the accident and death of Dean Hutchens, then you should determine what amount of damages the plaintiff should be awarded.

Damages, like any other proposition, must be proved by a preponderance of the evidence, and the plaintiff on that [215] issue has the burden of

proof. Now, the mere fact that I am instructing you on the subject of damages does not mean that I am of the opinion that the plaintiff is or is not entitled to recovery in this case. I am expressing no opinion on that subject one way or another.

In this type of case, assuming that the plaintiff is entitled to recover, it is the aim of the law to compensate plaintiff for any pecuniary loss that she has suffered by reason of her husband's death; however, if you find that there was contributory negligence on the part of Dean Hutchens and that such negligence contributed to his fatal injuries, then in such event the amount of damages which you may award plaintiff will be reduced in proportion to such negligence, if any, which you find Dean Hutchens was guilty of as compared to the negligence of the defendant.

By "pecuniary loss" we mean the loss having a financial advantage to the plaintiff which would include all prospective advantages of a pecuniary nature, if any, which were cut off by the death of Dean Hutchens. Pecuniary loss is not limited to the loss of financial contributions to the support of plaintiff but also includes the loss of other things which have pecuniary worth. In this connection you should take into account to the extent they have pecuniary value any loss of personal services Dean Hutchens would have performed for his wife, any loss of advice and counsel of the management of the [216] business affairs of the family which he would have rendered. You may not, however, include any compensation for mental anguish, suffer-

ing or bereavement, and you may not take into account the loss of society, companionship, comfort or protection, except in so far as they involve pecuniary loss.

You should consider the age, health and physical condition of Dean Hutchens prior to his death, his habits with respect to industry and his capacity to earn money, and the number of years that he normally would have been expected to live and earn money, his obligation to provide for the plaintiff, and his disposition to do so, and his disposition to render service for her, and from all of these circumstances determine what pecuniary loss, if any, the plaintiff has sustained by reason of Dean Hutchens' death.

After arriving at the amount of such pecuniary loss you will then determine whether the amount of damages to be awarded should be reduced because of any contributory negligence on the part of Dean Hutchens. If you find that Dean Hutchens was negligent in one or more of the respects charged and such negligence contributed to his death, then you will reduce the amount of damages which you have found in proportion to the negligence of the respective parties. For example, if you find that Dean Hutchens was contributorily negligent and that such negligence was responsible for 25 per cent of his fatal accident, then you would reduce the amount of damages by 25 [217] per cent and you would award plaintiff 75 per cent of the recovery which you would have ordinarily have given her had Dean Hutchens not been negligent in any par-



ticular. If Dean Hutchens' negligence contributed to the extent of 10 per cent the award should be reduced by that amount, and if he was guilty of negligence to the extent of 50 per cent then the award should be only one-half of that what would normally be given plaintiff had Dean Hutchens not been negligent.

The amount of damages you find which have or probably will be sustained by plaintiff after the reduction, if any, because of any contributory negligence on the part of Dean Hutchens, shall then be reduced to its present value and such amount will be the amount of your verdict in case you find that plaintiff is entitled to recover.

I think all of us know that money paid in installments over a period of years has a present cash value which is less than the total amount payable in installments over a period of years, and it would be your duty to determine what the present cash value of the pecuniary payments or the financial payments made to her and the other pecuniary loss suffered by plaintiff over a period of years.

At this time I want to call your attention again to the fact that you will not be called upon to determine damages until and unless you find the work which Dean Hutchens was performing at the time and place of the accident involved risk [218] or danger, and thus entitled to the protection and benefits of the Employers' Liability Act of Oregon. That the C. D. Johnson Lumber Corporation violated its duty to comply with such Act in one or more particulars, and that such violation was



the proximate cause of the accident and the resultant death of Dean Hutchens.

This case is not to be tried on the basis of any sympathy or passion or prejudice of any sort. You are to be guided solely by the evidence in this case and by the rules of law which I have laid down for you.

You are the sole and exclusive judges of the facts in the case and of the credibility of all the witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary but must be exercised with legal discretion and in subordination of the rules of evidence. The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in this case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives or by contradictory evidence. If you find that a witness has falsely testified in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false it will be your duty to [219] entirely disregard all the evidence given by such witness unless corroborated by other evidence which you do believe.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself

if true conclusively establishes the fact. If a witness testifies to a transaction to which he has been a witness, that is direct evidence, and you have that kind of evidence in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another, and which though true does not in itself conclusively establish the fact but furnishes a presumption or inference of its existence. That evidence is also before you in the nature of pictures and other evidence. It is, however, indirect evidence. Indirect evidence sometimes may be stronger on account of the inferences that may be drawn from it than the testimony of eye-witnesses.

You should look with caution upon the oral admissions of the parties, as that kind of evidence is subject to mistake. The parties themselves may have been misinformed or may not have clearly understood its meaning or the witness may have misunderstood.

Are there any instructions of a statutory nature which I have omitted?

Mr. Sims: I think not. [220]

The Court: We will take a five-minute recess during which a legal matter will be discussed. Will the jury retire for a period of five minutes?

(At the conclusion of the charge, a recess was taken, and the following proceedings were had herein without the presence of the jury.)

The Court: Plaintiff will take exceptions first. Who is going to take the exceptions for the plaintiff?

I want to call your attention to the fact that under the rules you will have to set out particularly each instruction which the Court has failed to give if you want to take an exception. You can't take a blanket exception.

Mr. Sims: You can't take a blanket exception as to instructions requested and not given?

The Court: No. Do you want to take a couple of minutes?

Mr. Babcock: It might be helpful.

The Court: We will take a recess for a couple of minutes. Before we do, I want to ask one question: Mr. Powers has submitted a verdict in which he shows W. R. Francis as the Third-Party Defendant. Now, that is part of the title of the case, and is there any objection to that?

Mr. Sims: Yes, there is. There is another legal matter, your Honor, that I did not raise at the time of argument. I felt that the case was nearing its conclusion and I didn't want to over-emphasize to the jury—when Mr. Powers addressed the [221] jury and made the remarks that he did on the Workmen's Compensation law, I felt the plaintiff was entitled to a mis-trial, and I don't want to pass that up. I feel that we are entitled to that, and I at this time make that motion.

The Court: Motion denied.

(Short recess.)

The Court: Go ahead.

Mr. Babcock: Plaintiff excepts to the instructions given by the Court and failure of the Court

to give certain requested instructions of the plaintiff in the following respects:

Plaintiff excepts to the failure of the Court to give Instruction 10 of the requested instructions of the plaintiff.

The Court: Let's see, what is that?

Mr. Babcock: To the effect that the employees of C. D. Johnson Lumber Company conducting the work were the agents of the defendant for that purpose, and their negligence——

The Court: Well, I think this jury is an experienced jury. If you want me to say that all corporations act through agents—do you want me to do that?

Mr. Sims: Yes, I think so.

The Court: All right. I will do that.

Mr. Babcock: And the failure to give Instruction No. 11 to the effect that Dean Hutchens was not a foreman or person in charge of the work and the duty to take the precautions was not the duty of Dean Hutchens. That is based upon the provisions [222] of the law itself and the cases cited.

The Court: Exception allowed.

Mr. Babcock: We except to the failure of the Court to give in substance the requested instruction contained in requested instruction 4 in the last paragraph——

The Court: Four?

Mr. Babcock: Fourteen—in the last paragraph thereof, to make clear to the jury that there could be no sole negligence causing the accident on the part of the plaintiff, and that there wasn't——

The Court: Exception allowed. I have given that at least three different times in three different ways.

Mr. Babcock: Exception to the failure to give Instruction 17 or its equivalent and make clear to the jury that any negligence or contributory negligence on the part of the plaintiff would have to be an effective cause of the accident, the direct and proximate cause.

The Court: Well, I used the words "having contributed." Do you want me to give—if you want me to give that—it is a tougher instruction—I will give it.

Mr. Babcock: I make this comment on that, that it occurred to us that the emphasis given that the plaintiff must prove causation as contrasted with the emphasis given to the requirement that the defendant must prove causation was unfavorable to plaintiff. [223]

In connection with the instructions given, we except to the Court's frequent emphasis throughout the instructions of the burden of proof on the plaintiff with respect to the various elements of the case and particularly with respect to the burden of proof on proving the acts of negligence as contrasted with the treatment given the same subject with respect to the defendant's burden of proof, and the constant repetition through the instructions of various points of each element that the plaintiff was required to prove.

We except to the instruction given with respect to unavoidable accidents on the ground that there



is no evidence in the case which would warrant the giving of any such instruction, was never an issue in the case and was never a contention in the case.

We except to the instruction given on causation for the additional reason that it was not made clear that the negligence of the defendant need not be the sole cause but may be a contributing cause, any effective cause, particularly because there has been a suggestion in the case that the negligence or failure on the part of Francis may have caused the accident.

We except to the Court submitting to the jury the first two specifications on negligence charged against the plaintiff, first that he failed to comply with the standing instructions about going between the load and the brow log [224] because there is no evidence in the case of any such instructions having been given, and the second that he failed to load the truck in such a manner so the chains could be released on the safe side, because there is no evidence in the case that he loaded the truck.

We except to the instruction given to the effect that if Dean Hutchens made his own working conditions, and if some act of his in that connection caused the accident, there would be no recovery on the ground that the defendant through its agents have sole control.

The Court: You may have your exceptions.

Mr. Powers: May it please the Court, the defendant would request exception, if the Court please, to the failure to give defendant's requested instructions No. 1 through 9. They were requests



that the specifications of negligence be withdrawn from consideration of the jury, and the reasons stated as to why we thought they should be withdrawn are stated in the requested instructions, your Honor, so the reasons given there I will repeat here without reading them because they do appear there.

And also we ask the Court for an exception to the Court's failure to give defendant's requested instruction No. 17. I am aware of the fact that the Court has taken a different view of the law in the case than we do, and that instruction has to do with what we considered a defense in the event Hutchens [225] was an independent contractor, it being our theory that if he were an independent contractor, if he was an independent contractor, that he would not be entitled to the benefits of the Act.

The Court: You raised that in the question on the motion for a directed verdict?

Mr. Powers: Yes. The instructions go to the same. And also the following requested instruction, which is defendant's request No. 18—that would go to the same point we asked for in respect to the Court's failure to give that.

And we ask for an exception, if the Court please, to the Court's refusing to give requested instruction No. 19 of the defendant. I am not sure—I don't think that you told the jury that if the driver was in charge of the truck and the unloading operations that then the Act would not be applicable because he himself would have the responsibility for seeing that the provisions would be enforced.

The Court: Mr. Babcock took exception to that because he thought I did give it.

Mr. Powers: Well, then, we would like an exception, if the Court please, to the Court's failure to give requested instruction No. 23, which is what the logging code provides with respect to bunker chains and that they be attached so they can be released from the opposite side from the brow log, and also the binder chains, and also exception to the Court's refusal [226] or failure to give requested instruction No. 24, which also has to do with the safety code and which forbids a person from going between the truck and the brow log.

Now, then, with respect to the Court's instruction on the Employers' Liability Act as stated to the jury, that they were first to determine whether risk and danger was involved and if so the Act would apply, we would except to that because we feel that that omits the status of the decedent which in effect is along the same line that we have already discussed. That was your instruction to them, that if risk and danger was involved—and we had a requested instruction on that matter about intermingling of employees.

The Court: I know the instruction.

Mr. Powers: Yes. And you left out the intermingling of employees and probably rules as a matter of law, but we think the instruction in that respect was incorrect and should have been given.

Now, we also ask for an exception to the Court's instruction with respect to—putting it in another way—we asked for withdrawal of certain specifi-

cations of negligence and you didn't withdraw those specifications, and then your instruction respecting an additional workman we do not feel under the evidence there is any evidence that would support that instruction, so we ask for an exception in that respect.

And we also would ask for an exception with respect [227] to the Court's instruction about the rules and regulations, which is specification of negligence No. 4 which has to do with instructing or someone in a supervisory capacity to instruct. We submit, your Honor, that that rule clearly was meant and designed for the particular employer and not for any third-party employer to instruct the employees of someone else.

Now, we have asked for an exception to the Court's—the comments with respect to that signal. We feel that the only competent evidence in the case, that there is no evidence in the case other than Neal's and that there was a signal given and it was a signal to unload, and the suggestion or inference by counsel is something else, but there is no competent evidence in the case that there was no other signal to give but the one to unload that was given, and that is argument.

Then we would like exception to the measure of damages there, your Honor, and we thought maybe—or your instruction on damages which they apparently requested—we thought maybe there was over-emphasis on this 10 per cent, 25 per cent and 50 per cent, without going to 90 per cent. The jury might have got the idea they couldn't go over

50 per cent in reducing the amount of damages. We would like an exception on that in any event.

Mr. Sims: In that connection, the specials——

The Court: You may have your exceptions.

Mr. Powers: Thank you, your Honor. [228]

Mr. Sims: The specials were omitted, the funeral bills.

The Court: Oh, yes. Thank you. I realize that.

Mr. Babcock: With the Court's permission I would like to make one additional exception I overlooked. Plaintiff also excepts to the Court's failure to give requested instruction No. 12 concerning the application of the provisions of the safety codes on the ground it is contrary to the evidence.

(Whereupon the jury returned to the courtroom and were further instructed as follows:)

The Court: Ladies and Gentlemen of the jury: During the recess attention was called to the fact that I had inadvertently failed to mention two items. First, during the course of the trial it was admitted that if the plaintiff is entitled to recover, an additional item should be included of \$974.71, which is the cost of funeral and burial expenses, and you are to treat that in the same manner as you treated the other damages if you allow any damages to the plaintiff; in other words, if you find that Dean Hutchens was free from negligence and that the accident was caused solely by the negligence of the defendant you would allow the full amount of \$974.71. However, if you find him 50 per cent negligent, or any other figure up or down

from that 50 per cent, you would make a corresponding adjustment in this \$974.71. For example, if it was 50 per cent, it would be about \$482. That is an item upon which the parties have agreed. If the plaintiff is entitled to recover, all or [229] some portion should be allowed.

Now, there is one other matter. I think all of you are acquainted with the fact that a corporation operates through agents, and we have referred throughout the instructions to the negligence of the defendant, C. D. Johnson Lumber Corporation. That means merely that one or more of the agents of the C. D. Johnson Lumber Corporation were negligent, so if you find that Mr. Neal or Mr. Vincent or anyone else connected with the C. D. Johnson Lumber Corporation was negligent with respect to the particular accident, that negligence would be negligence of the C. D. Johnson Lumber Corporation.

Any exceptions?

Mr. Sims: No. There is one thing that none of us noticed, I guess, and that is that you called the attention of the jury that the death was in April, and it was in August. I don't know how that happened. It is not serious. I know it was just an inadvertence, and the jury heard the evidence. It was August.

The Court: The death did not occur in April, but it occurred in August, 1949.

I am going to submit to you two verdicts. If you find in favor of the plaintiff you will sign one verdict which reads, "We, the jury in the above-en-



titled action, find in favor of the plaintiff and against the defendant and assess plaintiff's damages in \$. . . . .," and in that blank fill in the final [230] amount you agree upon; in other words, after you have deducted the amount of contributory negligence, percentage of contributory negligence, if you find that Dean Hutchens was negligent. Now, you are to use this verdict only in the event you find in favor of the plaintiff, and it is to be signed only by the foreman. However, as you know, the verdicts in a Federal Court must be by unanimous consent, and, therefore, before a foreman may sign this verdict, or the other one, be sure that it represents the collective judgment of all the persons.

Now, there is one other matter that I forgot to tell you about. Quotient verdicts are unlawful, and I think all of you have been instructed on quotient verdicts; in other words, if you decide in favor of the plaintiff and one person decides that he ought to get one amount of money and somebody else that he ought to get a second amount, and a third person thinks he ought to get a third amount; to add up what the twelve people believe and then divide by twelve and that is your verdict, well, that is an improper verdict, and if you do make a verdict of that kind it will have to be set aside. Whatever verdict you agree upon and you put down has to be the verdict of each and every person here. Of course, you can discuss the matter among yourselves and agree on a figure, but you just can't agree in



advance that you will divide—add up all the figures and divide by twelve. Is that clear?

Now, if, on the other hand, your verdict is in favor [231] of the defendant you will have a different form of verdict, and that verdict reads, “We, the jury in the above-entitled cause, having been first duly impaneled and sworn to try the issues, find our verdict in favor of the defendant and against the plaintiff.” And like in the other, if you decide in favor of the defendant, this verdict will be signed solely by the foreman.

You will have with you these two forms of verdict, together with all the exhibits in the case.

One of the first tasks will be to eat lunch, and the bailiff will make arrangements very soon.

(At the conclusion of the charge, the jury retired to consider its verdict.) [232]

### Certificate

I, Catherine Mulvey, Official Reporter of Department No. 8 of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I have transcribed into typewriting from the notes of Glenn G. Foster, now deceased, an official reporter of the above-entitled Court, the oral proceedings had and testimony given upon the trial of the above-entitled cause on June 20, 21, and 22, 1950, before the Honorable Gus J. Solomon, Judge of the above-entitled Court, and a jury, duly impaneled and sworn; and that the foregoing and

hereto attached 232 pages of typewritten matter, numbered 1 to 232, both inclusive, constitute a full, true, and accurate transcript of the said notes of the said Glenn G. Foster.

Dated at Portland, Oregon, this 17th day of March, 1951.

/s/ CATHERINE MULVEY,  
Court Reporter.

[Endorsed]: Filed April 5, 1951.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Notice to State Industrial Accident Commission, Plaintiff's motion for separate trials, Defendant's motion requiring plaintiff to elect theory, Order segregating issues between plaintiff and defendant, etc., Pre-trial order, Verdict, Plaintiff's motion for order directing entry of judgment, Defendant's motion for judgment notwithstanding verdict of jury, Defendant's motion for a new trial, Plaintiff's motion for reconsideration of opinion on motion for new trial, Order denying motion for reconsideration of Opinion, Remittitur, Order denying motion for a new trial, Order denying motion for judgment

notwithstanding the verdict, Order directing entry of judgment, Judgment, Defendant's notice of appeal, Order allowing transmission of original exhibits, Statement of points upon which appellant will rely on appeal, Appellant's designation of contents of record on appeal, Order to correct record, Order extending time for filing remittitur, Plaintiff's notice of appeal, Plaintiff's undertaking for costs on appeal, Statement of points upon which plaintiff, cross-appellant, will rely on appeal; Plaintiff, cross-appellant's, designation of contents of record on appeal, Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5087, in which Kathleen Hutchens is plaintiff and appellee and C. D. Johnson Lumber Corporation, a corporation, is defendant and appellant; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of this court.

I further certify that I am forwarding under separate cover transcript of pre-trial conferences, May 16 and May 22, 1951; Transcript of evidence June 20, 21, 22, 1951; Oral opinions dated December 5, 1950, and February 9, 1951, filed in this office in this cause, and Instructions requested by defendant C. D. Johnson Lumber Corporation, (not filed), together with plaintiff's exhibits 1 to 20, inclusive, and 23, also defendant's exhibits 1, 3, 4, 5, (2 exhibits numbered 5) and 6, five sheets with photographs attached (unmarked).

I further certify that the \$5.00 fee for filing appeal has been paid by the appellant and that the \$5.00 fee for filing cross-appeal has been paid by cross-appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District this 26th day of April, 1951.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 12914. United States Court of Appeals for the Ninth Circuit. C. D. Johnson Lumber Corporation, a Corporation, Appellant, vs. Kathleen Hutchens, Appellee. Kathleen Hutchens, Appellant, vs. C. D. Johnson Lumber Corporation, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 30, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

Civil No. 12914

KATHLEEN HUTCHENS,

Appellee-Appellant, Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Appellant-Appellee, Defendant and Third-Party,  
Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

APPELLANT'S DESIGNATION OF RECORD  
TO BE PRINTED ON APPEAL HEREIN  
AND STATEMENT OF POINTS

Comes now the appellant, C. D. Johnson Lumber Corporation, and ratifies and adopts as the statement of points to be relied on in the within appeal the statement of points filed by the appellant in the court below.

Said appellant further ratifies and adopts as its designation of record to be printed in the within appeal the said appellant's designation of contents of record on appeal filed in the court below except

that exhibits referred to under item 22 are not designated for printing. In addition to the said designation of record in the court below, said appellant designates the following additional matters for printing:

1. Stipulation of parties as to printing appeal record.
2. Order of above-entitled court allowing use of exhibits in original form.

/s/ JAMES ARTHUR POWERS,

Of Attorneys for Appellant-Appellee, C. D. Johnson Lumber Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of Court of Appeals and Cause.]

APPELLEE AND CROSS - APPELLANT'S  
DESIGNATION OF RECORD TO BE  
PRINTED ON APPEAL HEREIN AND  
STATEMENT OF POINTS

Comes now the appellee, cross-appellant, Kathleen Hutchens, and ratifies and adopts as a statement of points to be relied on in the within appeal the statement of points filed by the appellant in the court below.

Said appellee and cross-appellant designates the following additional matters for printing.



1. The order extending the time for filing the remittitur.

2. Notice of appeal of the plaintiff, cross-appellant.

3. Plaintiff, cross-appellant's statement of points upon which plaintiff, cross-appellant, will rely on appeal.

4. From the record of the pre-trial conference as shown by the reporter's transcript, the following material: Beginning at Line 11, Page 24, to the end of the page, and thence to and through Line 12 on Page 25.

5. Appellee, cross-appellant's designation of contents of record.

Dated at Portland, Oregon, this 28th day of April, 1951.

/s/ HARRY GEORGE, JR.,

Of Attorneys for Plaintiff, Cross-Appellant, Kathleen Hutchens.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of Court of Appeals and Cause.]

STIPULATION AS TO PRINTING  
APPEAL RECORD

It is Stipulated by and Between the attorneys for C. D. Johnson Lumber Corporation and Kath-

leen Hutchens that the original exhibits received in evidence upon the trial in the court below, together with original exhibits marked for identification and offered therein but not received in evidence may be considered by the Court in the within appeals in their original form without the necessity of being printed in the appeal record.

Dated at Portland, Oregon, this 27th day of April, 1951.

/s/ JAMES ARTHUR POWERS,

Of Attorneys for C. D. Johnson Lumber Corporation.

/s/ WM. A. BABCOCK,

Of Attorneys for  
Kathleen Hutchens.

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[Title of Court of Appeals and Cause.]

### ORDER TO ALLOW USE OF EXHIBITS IN ORIGINAL FORM

It appearing to the Court that the original exhibits received in evidence, together with original exhibits marked for identification and offered therein but not received in evidence upon the trial in the court below, have been transmitted as part of the appeal record in lieu of copies, and that said exhibits are voluminous and include many **photographs and tables of bookkeeping entries**, and it further appearing that the parties to within ap-

peals have stipulated that the said exhibits need not be printed

It is Hereby Ordered that the said exhibits may be considered by the Court in the within appeal in their original form without the necessity of being printed in the transcript of record.

Dated at San Francisco, California, this 30th day of April, 1951.

/s/ HOMER BONE,

/s/ WM. E. ORR,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed May 1, 1951.

